44 - 29125

EDWARD L. ENGLAND,
Plaintiff in Error,

vs.

RUDOLPH WURLITZER COMPANY,
a corporation,
Defendant in Error.

233 I.A. 603

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

From a judgment in favor of the defendant, the plaintiff brings this writ of error. Plaintiff is the purchaser from the executrix of the last will and testament of Elbert C. Ferguson, deceased, of the account of said Ferguson for attorney's fees for services performed by him on behalf of defendant in a suit brought to restrain B. C. Whitney and others from obstructing an alleged private alley adjacent to defendant's premises in Wabash avenue, Chicago. The injunction suit was begun in 1907. Ferguson died in 1917, while it was still pending. The present suit for fees was begun in 1918.

It appears that in March, 1907, defendant and the owners of the land adjoining defendant's premises became involved in a dispute regarding their respective rights to the use of the private alley (defendant claiming it should remain open to the sky in order to furnish light and air to the adjoining buildings, and the other owners claiming that defendant's use of the alley was restricted to a mere right of passage over the surface of the same at the street level and subject to the right of such owners to build over the alley, so long as defendant's passage-way was not obstructed), and the adjoining owners were about to construct a building in accordance

EDWARD L. SHEARER,
Plaintiff in Error,

vs.

RUDOLPH MUELLER COMPANY,
a corporation,
Defendant in Error.

23 I.A. 603

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

From a judgment in favor of the defendant, the plaintiff brings this writ of error. Plaintiff is the purchaser from the executrix of the last will and testament of Albert C. Ferguson, deceased, of the account of said Ferguson for attorney's fees for services performed by him on behalf of defendant in a suit brought to restrain R. C. Whitney and others from obstructing an alleged private alley adjacent to defendant's premises in Hubbard avenue, Chicago. The injunction suit was begun in 1907. Ferguson died in 1917, while it was still pending. The present suit for fees was begun in 1918.

It appears that in March, 1907, defendant and the owners of the land adjoining defendant's premises became involved in a dispute regarding their respective rights to the use of the private alley (defendant claiming it should remain open to the sky in order to furnish light and air to the adjoining buildings, and the other owners claiming that defendant's use of the alley was restricted to a mere right of passage over the surface of the same at the street level and subject to the right of such owners to build over the alley, so long as defendant's passage-way was not obstructed), and the adjoining owners were about to construct a building in accordance

with their claim, and thereby shut out the light and air from the private alley to all that part of defendant's building which was more than eighteen feet above the ground level. Thereupon a bill for injunction, prepared under Ferguson's direction, was filed by the Wurlitzer Company and a preliminary injunction was obtained. This stopped work on the building, and negotiations followed between the parties in interest, which resulted in the execution of a written agreement permitting the adjoining owners to proceed with the construction of their building as projected, without liability for contempt and without prejudice to the ultimate rights of any of the parties, upon the payment of $1000 to the Wurlitzer Company "for and on account of its solicitor's fees and expenses," and the reduction of the amount of the injunction bond. In pursuance of that agreement, the injunction bond was reduced from $15,000 to $1,000, and Ferguson collected from the adjoining owners the $1,000 stipulated to be paid for the complainant's fees and costs, retained one-half of the same and sent a check for the other half to Rudolph Wurlitz vice president of the Wurlitzer Company.

For eight years thereafter, very little appears to have been done by Ferguson in the suit except to see that answers were filed to the bill and to have the hearing of the case postponed from time to time. According to the plaintiff's statement of claim, the cause was referred to a master in June, 1912, but nothing was done before that master, and the order of reference was vacated in May, 1914. In November, 1915, a supplemental bill appears to have been filed, noting the changes in ownership, etc., to which the original answers were allowed to stand. Early in 1916, one of the adjoining owners filed a cross-bill, to which one of Ferguson's assistants, after first filing and withdrawing a demurrer, filed exceptions and an answer.

The correspondence between Ferguson and his client

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The correspondence between Ferguson and his client

shows that defendant frequently complained of the delay in bringing the suit to a hearing, to which complaints Ferguson usually replied by attempting to excuse the delay on various personal grounds and by promising to proceed with the case. In one such letter, written December 20, 1915, - nearly nine years after the suit was brought - Ferguson "assures" the defendant "that this matter will proceed with every speed that the courts will furnish."

In the fall of 1916, defendant had a meeting of its board of directors in Cincinnati, and Ferguson was present. Defendant's president complained to Ferguson of his delay in bringing the suit to a final conclusion, and told him that defendant "was considering the employment of other counsel to take his place in that litigation." Ferguson admitted he had neglected the case and gave as his excuse, that he and his wife had been sick and "that there was a great deal of business in his office." Defendant's president then said he "would employ other counsel." Ferguson asked him not to do that and offered, in case defendant would allow him to continue handling the case, "which he knew he could win," to make no charge "for any fees in the case unless he should bring it to a successful issue." Defendant accepted this proposition, and Ferguson went on with the case. A new order of reference to a second master had been entered in July, 1916, and in December, 1916, the taking of testimony before the master was begun. The hearings before the master were not completed when Ferguson died in June, 1917. The master's report is dated March 15, 1918. It recommends that the suit be dismissed for want of equity. This recommendation, in substance, was approved by the decree, which was eventually affirmed in the Supreme Court. (Surlinger v. State Bank of Chicago, 290 Ill. 98.)

The main contention of plaintiff's counsel is that Ferguson's promise, made at the directors' meeting in the fall of 1916, to make no charge for his services unless he should bring the suit to a successful issue, was without consideration and of no effect whatever. Counsel insists that "Ferguson was legally bound to go on with the case, and the defendant was legally bound to pay him for services already performed." This argument overlooks an essential feature of this case, which is unlike other contracts of employment. The contract made between Ferguson and the Surlitzer Company at the beginning of the litigation was a contract between an attorney and his client, and the right of a client to discharge his attorney at any time, with or without cause, is universally recognized. (2 R. C. L. 957.) When Ferguson's second promise was made, he had just been informed that defendant "would employ other counsel to take his place in the litigation." This was merely another way of telling him he was discharged from the case. If he had accepted this discharge, no doubt he could have maintained a suit for reasonable compensation for the services he had performed up to that time, which, under the facts stated, would not have been a great deal more than he had received. Instead of so doing, he made the proposition above stated and it was accepted by the defendant. In making this proposition Ferguson was faced not so much by the loss of any large sum for fees already earned, as by the threated loss of a good client and a prospective fee of a very much larger amount for "going on with the case." The acceptance by defendant of his offer under these circumstances constituted, in effect, a new contract, by the terms of which, in consideration of the withdrawal by defendant of its announced purpose of employing other counsel in his stead and the agreement on defendant's part to permit him to finish the case, he agreed to make no charge for any of his services in the case unless the final decision should be favor-

able to the defendant. By this new contract he not only retained a client he had virtually lost, but he also retained a chance, at least, to earn a very considerable fee for further efforts on his part, if successful. We think this was a good consideration for his promise.

The cases of Bishop v. Busse, 69 Ill. 403, and Cooke v. Murphy, 70 Ill. 96, are cited by defendant's counsel in support of their contention that the agreement was based upon a sufficient consideration, and an attempt is made by plaintiff's counsel to show that these cases are not the law in this state. We do not find that either of these cases has been overruled. They were distinguished in one case in the Appellate Court (Strauss v. Garrington, Patton & Co., 116 Ill. App. 418) by saying that "in one of these cases there was an abandonment of the work by the party bound to perform, and in the other an absolute refusal to perform, whereby the original contracts were held to have been terminated and the new agreements substituted." While there was neither an abandonment by Ferguson of the work he was hired to perform, nor an absolute refusal on his part to perform the same, his neglect to perform had caused the defendant to exercise its unquestionable right to discharge him from the case, whereby the original contract of employment was terminated. Then a new agreement was substituted, which, the cited cases hold, was binding on the parties if supported by a consideration. The landlord and tenant cases cited by plaintiff are not in point. Such contracts, unlike those between an attorney and his client, are not terminable at the will of one party.

What we have said practically disposes of this case. Several minor points are made by plaintiff, which, after due consideration, we think have no substantial merit. Counsel says that defendant took one position before this suit was brought, regarding the plaintiff's claim, and another position on the trial,

and that he cannot thus "amend his hold." We do not think that the statements made by defendant's officers when plaintiff presented his claim for Ferguson's fees and expenses, to the effect that the claim was "ridiculous," or was "too high," or "had been paid," deprived the defendant of the right to assert in its affidavit of merits, and to prove, that Ferguson agreed to make no charge for his services unless successful. The defense thus set up is not necessarily inconsistent with such previous statements. The matter of allowing an amended affidavit to be filed upon the trial was in the discretion of the court, and the fact that it was filed nunc pro tunc makes not a particle of difference. The amended affidavit was merely reframed to conform to the proof, and it was not error for the court to permit that to be done at any time.

Plaintiff also complains of errors, without pointing out what they were, in the rulings of the court as to the admissibility of certain testimony. He says: "It would be endless to attempt to point out to the court all the errors in the rulings on the testimony," which "would be but a repetition of the record." The testimony referred to is contained in depositions and the abstract shows the general nature of such testimony. It also shows that plaintiff made numerous objections, some of which were sustained and some overruled. He has not pointed out wherein any particular ruling was erroneous, and we cannot be expected to search the record to find such rulings, if any.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

60 - 29146

JOSEPH AND STEFANIA CHMIELINSKI,
Appellees,

vs.

BLAND BROTHERS AMUSEMENT ENTERPRISES, INC., et al. On Appeal of ASHLAND SQUARE THEATRE COMPANY, a Corporation,
Appellant.

230 I.A. 603

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of the Municipal court in an action of forcible detainer. The case was tried by the court on a stipulation of facts. Plaintiffs are the owners of a building on West 18th street, Chicago, used for a moving picture theater. On April 1, 1921, they leased the building and its equipment to James Kounovsky for a term beginning April 1, 1921, and ending August 31, 1923, at a stipulated monthly rental of $150. By one clause of the lease, an option was given to the lessee for "an extension for a period of three years at the same rental upon giving ninety days notice in writing of same."

It was stipulated that on January 1, 1922, the lessee, Kounovsky, "being in arrears in his rent," assigned his lease to the Bland Brothers Amusement Enterprises, Inc., and that as an inducement for the latter to accept such assignment and for the plaintiffs to consent thereto, a written agreement was made, reading as follows:

"Chicago, Illinois, January 1st, 1922.
"Bland Brothers Amusement Enterprises, Inc. Chicago.

"Gentlemen:

"In connection with the lease for the theater and contents at 1618 W. 18th street, we will accept as full payment of rent the sum of Seventy Five dollars per month, if you or your assigns will, during said period, operate said theater at least two days in each week."

This was signed by the plaintiffs under seal, and a copy thereof was signed and sealed by the new tenant. On January 3, 1922, Koumovsky, by his endorsement under seal on the back of his lease, assigned the same to "Bland Bros. Amusement Ent. Inc.," who by like endorsement, agreed to be bound by all the covenants and terms of the lease. The new tenant took possession at once and it and its successors have occupied the property, and paid rent for the same at the rate of $75 a month, continuously from that time until the end of the term prescribed in the lease. The stipulation of facts does not say in terms that the tenant did in fact "operate said theater at least two days in each week" as required by the written agreement of January, 1922, but it may be assumed that such was the case, from the fact that the reduced rent was accepted and from the further fact that no question is raised as to the tenant's performance of its part of such agreement. In May, 1922, the tenant corporation legally changed its name to "Bland Brothers, Inc.," and on September 1, 1923, again changed its name to "Ashland Square Theater Company, Inc."

On May 15, 1923, a notice was sent to the plaintiffs, signed: "Bland Brothers Amusement Enterprises, Inc., By Herman Bland, Pres.," stating that "I, the undersigned, the present tenant of the building" in question, "which I have occupied as a moving picture and dramatic theater under a lease dated April 1, 1921, do hereby exercise the option in said lease contained to extend the term of said lease for a period of three years, <u>at the same rate of rental that I have been paying under the modification of said lease dated January 1, 1921</u>." (It is evident that the last date mentioned refers to the separate written agreement dated January 1, 1922, since the original lease was made in April, 1921.)

The stipulation further states that on September 1, 1923, a formal tender of $75 was made to the plaintiffs for rent for the

month of September, which tender was refused, and plaintiffs thereupon brought suit for possession of the premises. On October 1, 1923, a formal tender of a like amount was made to the plaintiffs for rent for the month of October, and this was likewise refused. During the trial these tenders were renewed in open court, and were refused. It is finally stipulated that the officers and directors of the Bland Brothers Amusement Enterprises, Inc., and the Bland Brothers, Inc., were three brothers named Bland, while the officers and directors of the Ashland Square Theater Company, which is now in possession of the premises in question, are three other persons.

From the foregoing statement of the contents of the stipulation it will be noticed that when the lessee gave notice to the plaintiffs that it would exercise the option given in the lease, it assumed that the agreement of January 1, 1922, constituted a valid modification of the original lease to the extent of reducing the amount of rent payable under it, from the amount therein specified to the sum of $75 a month, and that all other portions of the lease remained in force as written; also, that the words of the option providing for an extension of the lease for three years "at the same rental" mean the rental payable under the lease as modified by the agreement of January 1, 1922. After reading the briefs and arguments of counsel, it seems clear to us that the main question involved on this appeal is whether the lessee was correct in making and acting upon these assumptions.

Both the original lease and the agreement of January 1, 1922, were in writing and under seal. It was perhaps unnecessary that they should be under seal, but the fact remains that both were sealed instruments. The ancient rule of the common law is still recognized in this state, that a sealed executory contract cannot be modified by parol (Alschuler v. Schiff, 164 Ill. 298), or by a written

agreement not under seal (Leach v. Farnum, 90 Ill. 368), but that an instrument of equal dignity is required to vary a contract under seal, although the original contract would have been valid without a seal. (13 C. J. 595; Leach v. Farnum, supra.) Parties to an unperformed contract may, by mutual consent, modify it by altering, excising or adding provisions, providing such modification does not make the contract illegal. (13 C. J. 589; 35 C. J. 1170.) When such a modification is made, however, it becomes a new contract (McHaffey v. Wisconsin Central Ry. Co., 147 Ill. App. 43) and a new consideration is therefore necessary to support it. (13 C. J. 592.) Such consideration may consist of the mutual assent of the parties to the new agreement (Kissack v. Bourke, 234 Ill. 352), or it may consist of the performance of acts to which one of the parties is not bound by the original contract. (13 C.J. 593.) In this case the agreement made on January 14, 1929, was in writing and under seal. This being true, a consideration is imported. (Adams v. Peabody Coal Co., 230 Ill. 469.) But if such were not the fact, the terms of the stipulation show that there was a new and valid consideration for the new contract, namely, the assignment of the lease by a tenant (Kounovsky) who was then in arrears for rent and evidently not operating the theater more than one day a week, to a new tenant, who was apparently able to perform, and who did assume, all the covenants of the lease, except as modified by the agreement mentioned, and who agreed to operate the theater at least two days a week during the period covered by the lease. This agreement was followed by a formal assignment of the lease from the old tenant to the new one, the written acceptance of the same by the new tenant, and the written consent of the plaintiffs to such assignment - all endorsed on the lease. It is a fair inference from the stipulation that the new agreement was brought about by the plaintiffs and resulted in giving them a good tenant in place

of one who had failed to make the operation of the theater a success. The agreement was therefore beneficial to the plaintiffs as well as to the lessee. By its language it specifies the particular lease to which the agreement applies, and the terms of the new agreement. It must therefore be held that the agreement in question constituted a valid modification of the original lease. As there is no language in the modification purporting to affect any other covenant or condition in the lease than the one regarding rent, it must further be held that when the original lease was assigned to the new tenant with the plaintiffs' written consent, no other provision or term of the lease was affected by such modification than the clause concerning the payment of rent, but that in all other respects the lease remained as originally written. (35 C. J. 1172.)

From this reasoning it also follows that the language of the lease which grants to the tenant an option for an extension of three years "at the same rental," means the rental payable under the lease as modified by the agreement of January 1, 1922, and that the words "during said period" mean the period during which the premises continue to be occupied by "Bland Brothers Amusement Enterprises, Inc." or its successors or assigns, whether such occupation was prior to August 31, 1923, or thereafter under the term created by the exercise of the option given in the lease.

Counsel on both sides have discussed at considerable length and with much citation of authority the question whether an option for an extension of a lease such as was here given, is a present demise "which becomes operative immediately upon the exercising of the option conferred," defendants contending that it is such a present demise, and the plaintiffs contending to the contrary. We do not think a decision upon this question would be necessarily determinative of any issue involved in this case. Upon

the stipulated facts, the real question here involved is whether the agreement of January 1, 1922, was a valid modification of the original lease to the extent, and only to the extent, therein specified.

It is contended by plaintiffs' counsel that because the assignment of the lease was to a tenant by a corporate name, when in fact such corporation was not organized until three weeks later, the organization of such corporation operated as a second assignment of the lease without the consent of the plaintiffs, and therefore was a violation of the clause in the lease prohibiting the assignment thereof without the consent of the lessors. The agreement of January 1, 1922, and the assignment on January 3, 1922, were signed not by the Bland Brothers, or by any other individual or partnership, but by the "Bland Brothers Amusement Enterprises, Inc." It is true that the certificate of the completed organization of that corporation shows it was not fully incorporated until January 23, 1922, but it was organized and doing business before the first day of the next month came around, and the stipulation shows that such corporation and its successors occupied the property and paid rent to the plaintiffs at the reduced rate for sixteen months thereafter, and that plaintiffs received and retained the same without objection, as the agreed rent for the premises during that time. We think plaintiffs are plainly estopped by their own acts from making this claim.

For the reasons stated, the judgment of the Municipal court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, J., concurs.
Barnes, J., dissents.

95 - 29182

ETHEL W. MILLER, administratrix of the estate of Harry E. Miller, deceased,
Appellee,

vs.

ILLINOIS ELECTRIC COMPANY, a corporation,
Appellant.

230 I.A. 603

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $4000 in an action for wrongful death alleged to have been occasioned by the negligence of defendant. Defendant claims the judgment is erroneous because the evidence fails to show any privity between defendant and plaintiff's intestate, and fails to show any negligence on defendant's part which proximately caused the death of plaintiff's intestate, or that the deceased exercised due care for his own safety.

The case went to the jury on the third count only of the declaration. That count, which plaintiff claims was sustained by the evidence, and which defendant claims was not so sustained, is in substance as follows: That on February 25, 1922, defendant was a dealer in electrical appliances and engaged in the business of repairing the same; that Charles Westerholm then owned an electric heater, used by him and the members of his family to heat a bathroom in the apartment occupied by them; that said heater was so constructed that "if the wires and conductors of said heater were not properly insulated and protected, said heater would be dangerous when used in said bathroom;" that on the day named Westerholm employed defendant to repair the

heater, which defendant did "in such a negligent and careless manner that the electric wires and conductors in said heater which run into and through said heater came in contact with the metal frame of said heater, and said wires and conductors were not properly insulated;" that "said heater was so repaired by defendant that any person who might touch or come in contact with any part of said heater while in use was likely to receive an electric current and be injured or killed, all of which was then to the defendant known;" that defendant delivered the heater in that condition to Westerholm, who installed it in his bathroom; and while plaintiff's intestate, who was a member of Westerholm's family and an occupant of his apartment, was using the heater and was in the exercise of ordinary care for his own safety, he came in contact with the heater and by reason of said negligence of the defendant, plaintiff's intestate received an electric current through his body and was so injured that he died on March 25, 1922, leaving him surviving his widow, his sole heir and next of kin.

It appears from the evidence that Westerholm, the father-in-law of plaintiff's intestate, bought the electric heater mentioned in the declaration from defendant about two years before the accident happened; that he used the heater at first in his bedroom, and later he hung it in the bathroom on a hook inserted in the middle of a window frame several feet above one end of the enamelled iron bathtub. It was connected with a double electric light socket by means of a wire cord. About a month before the accident, the burner, or heating element, in the heater burned out and Westerholm testified that he took the whole heater to defendant's shop to be repaired; that defendant put in a new burner, and that on February 25, 1922, Westerholm called at defendant's place of business, took it home and hung it in the same place in the bathroom. Westerholm also testified: "So far as I know, it operated

properly after it was repaired." It was regularly used thereafter by each of the three members of the family two or three times a week until March 25, 1922, the day of the accident. On that date, plaintiff's intestate went into the bathroom, turned on the water in the bathtub and opened the switch at the double socket for the heater and electric light. A few minutes later, his wife, who was alone in the apartment, heard him scream. She ran into the bathroom and found her husband "standing rigid" in the bathtub with his left hand in contact with the wire framework over the face of the heater. Mrs. Miller switched off the current and the body of her husband relaxed in her arms. He was dead in a few minutes.

Two days after the accident an electrical inspector in the employ of the City of Chicago was called to inspect the heater. He found it "hanging on a nail in the bathroom," took it downstairs and there made a preliminary test. He found that the electric current "came into the framework through the wire attached to it for the purpose of the experiment." He then took the heater to the laboratory in the city hall for a further test. There he tested the heater again and found "that the connection from conductors to frame was not there at that time." Then he took the heater apart, and testified that he found "there was a loose connection, one or more." In the construction of the heater, the heating coil or filament is fastened to the center of a concave metal reflector by means of two small bolts which pass through holes in the reflector having diameters perhaps twice as large as that of the bolts. These bolts conduct the current of electricity from the outside source through the holes in the reflector to the heating coil. An assembly of mica washers is placed around each bolt to insulate it from the metal reflector. When the bolt and washers are in their proper places and are firmly held in place by means of a nut on the end of the bolt, there is, or should be,

no chance for the bolt to come in contact with the metal reflector. The witness explained that what he meant when he said he found a "loose connection" was that he found that one of the nuts above mentioned had become loosened, thereby making it possible for the reflector (and through it, the framework of the heater) to become charged with electricity if, by any means, the washers should become separated and the bolt should slip from its proper place and come in contact with the metal reflector.

There is, however, no evidence in the record that either of the nuts so described was loose at the time the heater was repaired by the defendant, a month before the accident, or became loose thereafter through any fault of the defendant. On the contrary, the workman who made the repairs testified that he put in the new filament without disturbing the nuts and bolts above described, and without touching them except to see that they were tight, which he found them to be. The manner in which the heater is constructed shows that this could easily have been done, and as it was the burner which was apparently at fault, the natural thing to do was to put in a new burner without disturbing the other connections. There is also the further evidence that the heater worked properly for over a month after the repair was made. We think the verdict upon the question of defendant's alleged negligence is manifestly against the weight of the evidence.

Plaintiff claims that the question of the negligence of the defendant is not before this court for review, for the reason that defendant ceased two special interrogatories to be submitted to the jury which show, plaintiff claims, that the jury found that plaintiff's intestate was not guilty of any contributory negligence and that defendant was guilty of the negligence charged, and that defendant did not in its written

motion for a new trial, or elsewhere in the trial court, question the correctness of such finding, or assign any error thereon in this court. In the comparatively recent case of Brimie v. Belden Manufacturing Co., 287 Ill.11, it was held that a defendant is conclusively bound by a special finding of fact unless error has been assigned thereon and the question of the correctness of such finding has also been raised on a motion for a new trial.

The two special interrogatories submitted to the jury in the present case and their answers were as follows: "1. Could the deceased, in the exercise of reasonable care for his own safety, have avoided the electric charge or accident in question? Ans. No." "2. Did the deceased come to his death by reason of an accident, without fault or neglect of the defendant? Ans. No." As to the first interrogatory, we think the case of Empire Laundry Machinery Co. v. Brady, 164 Ill. 56, is controlling. There, a special finding was submitted to the jury as follows: "Could the deceased, Stafford N. Brady, have avoided the accident complained of, which resulted in his death, by the exercise of ordinary care and prudence?" to which the jury answered "No." The special finding submitted in this case is substantially the same as in that case, and it was there held that as no objection was made to the finding in the trial court the question of contributory negligence was not open to review in the higher courts.

As to the second special finding a different question is presented. The question is ambiguous in its form, and the negative answer given by the jury is not necessarily equivalent to an affirmative finding that defendant was guilty of any negligence. It may or may not mean that the accident happened through the "fault or neglect of defendant." It may mean only that the deceased did not come to his death by reason of an unavoidable accident such as was suggested to the jury by the first of

defendant's given instructions. But a negative answer of that sort is not equivalent to an affirmative finding of negligence on defendant's part. Certainly there is nothing in the form of the question which suggests to the jury that a negative answer would mean that defendant is guilty of such negligence as is charged in the third count, to-wit, that when defendant repaired Westerholm's heater he left one of the connections so loose that it was dangerous for anybody to use it, and, knowing that to be true, delivered it, nevertheless, to Westerholm in that condition. That is the charge in the declaration, and we are of the opinion that the second special finding of fact is not such a specific finding of negligence on defendant's part as to preclude it from raising the question whether its alleged negligence has been shown by a preponderance of the evidence.

It is also contended that no liability of the defendant is shown in any case, because, it is said, there was no privity between the defendant and the deceased. In Davidson v. Montgomery Ward & Co., 171 Ill. App. 355, the court, following Cooley on Torts, 1486, stated the general rule to be that the manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him, for negligence in the construction, manufacture or sale of such an article. But this rule is subject to a well established exception in favor of a third party who is injured by an article manufactured, bought or furnished, which, while not inherently dangerous, is known to be dangerous to human life or limb on account of its defective condition. This is apparently the theory of the count upon which the case was tried; for it is there alleged that defendant knew the heater was defective and dangerous when it was delivered to Westerholm. If plaintiff, upon another trial, is able to prove the facts alleged in the third count, a prima facie case of liability under the

exception stated, will have been shown.

For the reasons stated, the judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

116 - 29198

EMMA MEYER,
Appellee,

vs.

CLARA K. MEGNET,
Appellant.

23 I.A. 603

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for personal injuries alleged to have been caused by the negligence of the driver of defendant's automobile. Just before the accident, plaintiff was standing on the sidewalk on the west side of Broadway, north of the intersection of Sheridan road, waiting for a southbound street car. A street car approached and plaintiff stepped off the curbstone to the street. At that moment, defendant's car, occupied and operated by one Redfield, was backing up from Sheridan road along the curb from which plaintiff stepped. She was hit by the back of the car and thrown to the ground. Her left foot was caught by one of the rear wheels, and was painfully lacerated. No bones were broken. The case was twice tried. Upon the first trial there was a verdict for the plaintiff for $6,000, which was set aside by the trial court. On the second trial there was a verdict in plaintiff's favor for $13,688. Upon the motion for a new trial the trial court required the plaintiff to remit $6188, and a judgment was entered for the remainder, $7500. This appeal followed.

It is contended by defendant's counsel that the evidence shows that plaintiff failed to exercise ordinary care for her own safety at the time of the accident, that defendant was not guilty of any negligence, that the driver of the car was not the agent

of the defendant, nor engaged at the time on any business of the defendant, that the damages awarded are grossly excessive, and that the court erred in refusing to submit to the jury two special findings of fact and in refusing one instruction. As we have come to the conclusion that at least the last two of these errors are well assigned, we shall refrain from expressing any opinion as to the merits of the case, beyond what may be necessary to explain our conclusion.

The court refused to submit to the jury two special findings requested by the defendant in apt time, reading as follows:

> "At the time and place in question, was the plaintiff guilty of contributory negligence?"
>
> "At the time and place in question, was the defendant guilty of negligence?"

Each of these interrogatories relates to an ultimate and controlling fact put in issue by the pleadings, and it was reversible error for the court to refuse to submit them when properly requested. (Cahill's Stats. Chap. 110, Sec. 79; C.C.Ry. Co. v. Nichols, 90 Ill. App. 440.)

Plaintiff's counsel attempt to avoid the effect of this error by saying that the facts were not controverted. We do not so read the record. It is true that the defendant offered no affirmative evidence, but it does not follow from this that the questions of negligence and contributory negligence were not controverted. The evidence of plaintiff's witnesses contains contradictory statements on material points. For example, plaintiff testified that just before she stepped from the sidewalk to the street she looked to the south and saw no automobile in that direction. Yet the rest of her testimony shows there was a Pierce-Arrow limousine backing towards her only a few feet south of her. The statements are inconsistent and it was for the jury,

and not the court in the first instance, to decide whether she exercised due care for her own safety under such circumstances.

Counsel also say that the question of defendant's alleged negligence depends upon the relation of the driver, Redfield, to the defendant. That is true, but the evidence on that point was also contradictory. The testimony of Redfield and of defendant's son does not agree in material respects, and the testimony of the latter leaves much for conjecture and dispute. Under the pleadings, the burden was on the plaintiff to prove the relation between the driver and the defendant, and the most that can be said of such proof, as contained in this record, is that while there is a single sentence in the son's testimony which seems to bear out the plaintiff's contention that Redfield was defendant's agent at the time of the accident, all the rest of his testimony, as well as that of Redfield, appears to show that the driver was not in the defendant's service at the time of the accident, but was in her son's employ and was engaged in performing the son's business at the time of the accident. The only theory on which the defendant can be held to be liable is that she owned the automobile and authorized her son to employ a chauffeur to drive the car for any member of her family who wished to use it for a family purpose. There is some evidence tending to support that theory; but there is also evidence from which a jury might well infer, as claimed by defendant's counsel, that the son was the head of an independent family and had merely borrowed his mother's automobile for his own personal use; in which case the negligence of Redfield would not be that of the defendant.

That we have said leads to our further conclusion that the court erred in refusing to instruct the jury, as requested by the defendant, "that plaintiff is not entitled to recover against defendant unless plaintiff has proved by a preponderance or greater weight of the evidence that at the

time and place in question the automobile in question was being operated by a servant or agent of the defendant and that said servant or agent was then and there engaged in the performance of defendant's business." This instruction is a correct statement of the law applicable to the facts of this case; and as it was not covered by any other instruction it was error for the court to refuse it. In fact, the abstract discloses that defendant submitted several instructions upon this point and that the court refused all of them, leaving the jury wholly uninstructed upon the question of the agency of Redfield, the most vital point in the case.

For the reasons stated, the judgment of the Superior Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

121 - 29209

COMS LITHOGRAPHING COMPANY, Appellee,	23 I.A. 604
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
GALLANIS BROTHERS, a corporation, Appellant.	

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered upon a directed verdict in plaintiff's favor for the amount due on two of defendants' promissory notes. The only defense made was that plaintiff, with six other of defendants' creditors, verbally agreed with defendants to extend the time of payment of their respective claims for sixteen months, in consideration of a promise on defendants' part to convey to trustees certain real estate to be held as security for such claims.

Upon this defense defendants had the burden of proof. There is proof in the record to the effect that a meeting of the seven creditors mentioned was held in the office of Mr. Healy, attorney for one of them, in Chicago; that all attended the meeting, or were represented there; that a talk of two hours' length ensued, during which a proposition was outlined by Mr. Healy in substance as above stated; that several of the creditors present stated that they "would go along" on such a proposition; that the other creditors, including the plaintiff's representative, said nothing; that Mr. Healy then said: "Well, I will take it for granted that everybody is satisfied here to go ahead, and I will draw up an agreement to that effect," whereupon the meeting broke up. Plaintiff brought this suit the next day after that meeting.

and when a formal agreement was presented to plaintiff twenty days later for its signature, it refused to sign the same.

The effect of the action of the trial court in directing a verdict for the plaintiff upon this evidence was to hold that there was no evidence tending to prove that plaintiff had ever agreed to the proposed extension. After a careful examination of the evidence contained in the record, we fail to find any evidence that plaintiff ever agreed to the extension. It is clear from the evidence that the meeting of the creditors adjourned without any definite agreement having been reached, but with the understanding that Healy was to prepare and submit to the creditors a written agreement for an extension upon the basis roughly outlined by him at the meeting. Such an agreement was afterwards prepared, but plaintiff refused to sign it. Under these circumstances, there was no contract that was binding on the plaintiff. (6 R.C.L. 618.) Hence the trial court properly directed a verdict for plaintiff.

The judgment is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

148 - 29237

230 I.A. 604

ELIZABETH F. CULLERTON,
Appellee,

vs.

JOHN V. KELLEY and
HEATHER KELLEY,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE WITCH
DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $270 for commission upon the sale of a three-flat building, in Chicago, belonging to defendants. Defendants claim that the verdict is against the weight of the evidence and that the court erred in certain rulings on the admission of evidence and in refusing to orally instruct the jury as suggested by defendants' counsel.

The bill of exceptions, or stenographic report, filed in this court does not show that any motion for a new trial was made. In the absence of such a motion, the question of the weight of the evidence cannot be considered on appeal. (Anderson v. Karstens, 297 Ill. 76, 79.) The common law record, as certified by the clerk, states that such a motion was made and overruled, but such a certificate does not make the motion a part of the record. In order to become part of the record the motion for a new trial must be contained in the bill of exceptions. (Anderson v. Karstens, SUPRA.) In the absence of such a motion, the only alleged errors which can be considered by this court are errors in the rulings of the court on the admission of testimony and errors in the giving or refusing of instructions, if any. (I.C.RR.Co. v.

O'Keefe, 184 Ill. 508; Kerber v. C. & A. Ry. Co., 236 Ill. 589, 603.) We have examined the abstract, and, indeed, the record itself, as to such alleged errors, and find that the material part of the testimony complained of was not objected to, and that the oral instruction requested had no application to the facts of this case. The only question in dispute was whether the plaintiff was the procuring cause of the sale that was in fact made, and her testimony, if believed by the jury, was sufficient to prove that fact. Evidently, the jury believed the plaintiff and did not believe the defendants, and whether the jury was right or wrong in that conclusion we cannot consider for the reasons already stated.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

160 - 39248

FRED A. LOHN, Appellee, vs. J. A. FOBERG, Appellant.	230 I.A. 604 APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Upon a second trial of this case before a jury, plaintiff recovered a verdict for $600, and from a judgment entered upon the verdict the defendant again appeals.

The suit was for personal injuries sustained by the plaintiff when, as he claims, he stepped off the front end of a street car at Kedvale avenue and Irving Park boulevard, Chicago, where it had stopped to discharge passengers, and was hit by defendant's automobile, which was passing. Defendant claims that the car had not stopped to discharge passengers, but was moving towards the intersection named when the front door opened and plaintiff jumped to the street directly in front of the passing automobile.

These theories have been presented to two juries and both have found against the defendant. The first case was reversed because of an error in refusing to admit certain evidence. (See Lohn v. Foberg, No. 27690, opinion filed May 9, 1923.) That testimony was admitted on the second trial and defendant now claims that plaintiff was guilty of contributory negligence as a matter of law, that the verdict is manifestly against the weight of the evidence, and that the court erred in refusing three instructions.

Upon both trials the plaintiff testified that he was riding on the front platform of a vestibuled street car going east on the south track of Irving Park boulevard; that the car stopped at the corner of Kedvale avenue; that the motorman opened the door and that he, plaintiff, alighted and started to walk in a southwesterly direction towards a station of the Chicago & Northwestern railroad located near that point; that as he stepped off the street car he glanced to the west and saw no vehicle approaching, and that he could see a long distance in that direction. If this were the only evidence it is clear, as was said by Mr. Justice O'Connor when the case was in this court before, that plaintiff, from his own story, was guilty of contributory negligence either in failing to look before stepping directly into the path of defendant's approaching automobile, or in failing to see it, if he looked. Upon the second trial, however, there was testimony to the effect that immediately west of the place of the accident there is a viaduct which carries the tracks and roadbed of the Chicago & Northwestern railroad over and across Irving Park boulevard, that under the viaduct and between the street car tracks and the roadway on the south side of the boulevard, there are four steel columns, each approximately eighteen inches square, and there is some evidence tending to show that defendant was driving directly behind the street car until just before the accident, and then, after passing the steel columns, turned into the roadway south of the street car tracks to pass the street car. If such was the fact, the plaintiff's view of defendant's approaching automobile might have been obstructed by the columns and this might reasonably explain his failure to see any vehicle coming from that direction. It is true, the evidence on this point is very slight, but it is in the record, and the defendant did not deny that such was the fact.

Upon this evidence, it cannot be said that plaintiff was guilty of contributory negligence as a matter of law nor that the verdict is manifestly against the weight of the evidence.

As to the alleged error in refusing instructions, we have examined the instructions offered and find there was no error in refusing them. The first was covered by other instructions in substance and the third was not a good instruction. The second instruction might well have been given, but we cannot see how defendant was in any manner injured by refusing it. If given, it would have called the attention of the jury to the fact that the court had overruled motions to direct a verdict for the defendant.

Finding no substantial error in the second trial, the judgment is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

288 - 29377

230 I.A. 604

THE FARR BROTHERS COMPANY,
a corporation,
Appellee,

vs.

WILLIAM MEECH,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon a directed verdict for the plaintiff. Plaintiff is a dealer in building materials, and its claim is for a balance of $1342.13 alleged to be due for materials sold and delivered to defendant, who is a building contractor. To this claim defendant filed a set-off, alleging that part of the material included in plaintiff's claim was furnished by the plaintiff to be used in constructing certain buildings for the South Shore Country Club, which material, when used, proved to be defective and unsatisfactory, whereupon plaintiff agreed to furnish new material free of charge to replace the same, and to pay the necessary labor cost involved; that defendant, accordingly, replaced the defective material with new material furnished by the plaintiff, and did this under the supervision of the plaintiff; that the new material proved to be likewise imperfect and unsatisfactory, and the country club deducted $610 from the contract price on account of such defective materials; that the labor cost involved in replacing the defective material was $490.40, making a total counterclaim, or set-off, of $1100.40.

Upon a motion for a directed verdict, the rule is that if there is any evidence tending to support the claim of the party against whom the motion is directed, the motion must be denied, for to hold otherwise is to deny the right of a trial by jury. (Libby v. Cooke, 222 Ill. 306; Balsewicz v. C. R. & Q. R. R. Co., 240 Ill. 238.)

There is testimony in the record tending to prove the following state of facts: One Robbins, who was an officer of the American Magnesia Products Company, manufacturers of a kind of cement called "Scratch Kragstone," used in stucco work, learned that the South Shore Country Club, of which he was a member, was contemplating having its stables stuccoed. Plaintiff handled the product of the manufacturing company, and was requested by Robbins, who wanted his material used by the country club, to have some contractor make a bid for the country club work, specifying his cement. Plaintiff's vice-president thereupon detailed one of its salesmen, named Brooks, to carry out Robbins' plan. Brooks induced the defendant to make such a bid. The country club desired to have its stables covered with stucco of the same color as its other buildings, and at a meeting at which Brooks, the defendant, Robbins, and an officer of the country club were present, it was agreed that Robbins should furnish the plaintiff with cement that would produce the same color, when finished, as the buildings of the country club already constructed. Brooks testified that Robbins gave the plaintiff and defendant "instructions as to what kind of material he was going to furnish and how it was supposed to be applied;" that Robbins did not then have any sample of such material, but that at a later meeting with the club's architect Robbins produced a sample of the material he proposed to use, and said he would manufacture and deliver that material to plaintiff, who would furnish it to the defendant to be used. Brooks further

testified that this material was "something new, which had never been put on the market before." Plaintiff's bid on that basis was accepted, and "pursuant to the agreement made by the gentlemen," (as Brooks testified) defendant "ordered" the material from the plaintiff. Brooks also testified that he reported what had transpired to his superior, plaintiff's vice-president, who told him: "You do just what Mr. Robbins tells you to do." Brooks said he was "on the job every day" and "saw the work put on," and that after it was finished, the stucco was "blotchy, cloudy, and of different colors." Thereupon a conference was had between Robbins, Brooks, the defendant, and an officer of the country club, and it was agreed that Robbins' company should furnish new material to replace that which was defective, and "would allow for the extra labor it took to do the job over again, providing the American Magnesia Company would put their foreman or superintendent to oversee it." Brooks testified that he told Mr. Hale, plaintiff's vice-president, that the job was to be done over and that the Magnesia Company was to furnish the material and labor, and also testified that thereafter plaintiff furnished and delivered the material for doing the work over. Defendant testified that soon after this conference he met Mr. Hale and told him "that they had agreed to pay for doing the job over, that they were sending the material out," and that he asked Hale when plaintiff "was going to get it out for me," to which Hale replied: "I suppose you can call up the office whenever you want it," meaning Farr Brothers' office, whereupon defendant called up that office and got the material. The price of this material constituted part of the plaintiff's claim in this suit. We think the testimony of Brooks and of defendant was sufficient to make out a prima facie case for the defendant upon at least a part of his claim of set-off, and therefore the court erred in directing a verdict for the plaintiff.

Plaintiff's counsel contend that in the whole transaction there was nothing but a sale by the plaintiff to the defendant of specified articles of merchandise without any warranty, express or implied. We cannot agree with this theory of the facts. While plaintiff's invoices, offered in evidence, use the words "Scratch" and "Kragstone Finish," as descriptive of the material delivered, all the other evidence shows that the material bargained for was not the same as that manufactured and sold under the name "Scratch Kragstone." It was "an experiment in material, something that had never been done before," which "looked like cement, only not quite so fine, and had a cherry color." Defendant's bid for the work was accepted only after a sample of this new mixture, or product, was shown by Babbins to the country club's architect. On the present record, the case is more like one of a sale by sample than a sale of a specified article under its trade name. Furthermore, the testimony on defendant's behalf tends to prove an express agreement on the part of the manufacturer, acquiesced in and carried out by plaintiff, to furnish the necessary material and labor required to do the work over free of charge to the defendant.

For the reasons indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

198 - 29287

WITWICK-TUMPEER CHEMICAL CO., a corporation, Appellee, vs. UNION DROP FORGE COMPANY, a corporation, Appellant.	238 I.A. 604 APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In this case, plaintiff sued upon a bill of exchange drawn by one M. W. Sharpe upon the defendant, and accepted by it, payable to Sharpe's own order forty-five days after the date thereof and endorsed by him and delivered to the plaintiff. Defendant filed an amended affidavit of merits stating that there was no consideration for the execution of the bill of exchange sued upon, that defendant was not indebted to the drawer, or the payee, or the plaintiff "upon any consideration whatever," that the promise of the defendant was a mere naked promise without any good and valuable consideration therefor, and that plaintiff is not a holder in due course of the bill of exchange. Upon motion of the plaintiff, this affidavit was stricken from the files, and the defendant electing to stand by it, a judgment was entered as by default for the amount alleged to be due upon the note, or bill of exchange. The sole question presented here is whether the affidavit of merits is sufficient to show a good defense and the nature of such defense.

Almost the identical question thus presented was decided by the Supreme Court in the case of Matthiessen v. Dunlop, 307 Ill. 36, where it was held that an affidavit of merits, the language of which was substantially the same as that part of the

affidavit in this case which alleges a want of consideration for the note sued on, was a sufficient statement of a good defense upon the merits, both under the statute and the rules of the Municipal Court, and that it was error for the Municipal Court to strike it on motion.

In view of that decision of the Supreme Court, plaintiff's counsel does not here contend that the allegation of want of consideration for the note, or bill of exchange, is insufficient, but contends that the remainder of the affidavit (which avers that plaintiff is not "a holder in due course" without setting out facts showing that to be true) is not a sufficient statement of a good defense. We cannot agree with this contention. Section 28 of the Negotiable Instruments Act provides that absence of consideration "is a matter of defense to any person not a holder in due course," and Section 52 of the same act states that "a holder in due course" is one who became such holder before the note was due, who took it in good faith and for value, and without notice of any infirmity or defect in the title of the person negotiating it. In Brown Construction Co. v. Forbes, 305 Ill. 303, it was said that the term "holder in due course" was used in the Negotiable Instruments Act as equivalent to the old expression "bona fide holder for value without notice." The statement, therefore, in the affidavit of merits, that plaintiff is not a holder of the note in due course, is equivalent to a statement that plaintiff did not in good faith before the maturity of the note, give or pay value for the same, and that plaintiff had notice of the fact that the note was executed without consideration. If plaintiff was not such a bona fide holder for value of a note executed without any consideration, defendant is not liable to plaintiff, even as an accommodation acceptor. (Neg. Inst. Act, Sec. 29.) This part of the affidavit of merits placed upon the plaintiff the burden of proving a fact that would otherwise be presumed.

The judgment of the Municipal Court is reversed, and the cause is remanded for a trial upon the issues made by the plaintiff's statement of claim and the amended affidavit of merits.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

199 - 29288

U. S. MORTGAGE CO.,
a corporation,
Appellee,

vs.

UNION DROP FORGE CO.,
FRANCIS D. HOLBROOK,
ALLIANCE STEEL CORPORATION,
and JOSEPH B. LAWLER,
Appellants.

23 I.A. 305

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

To a statement of claim alleging that the defendants are indebted to plaintiff upon a promissory note signed by the Union Drop Forge Company, payable to the order of the Alliance Steel Corporation, and endorsed by it and the other defendants, the Forge Company and Holbrook filed an amended affidavit of merits alleging that there was no consideration for the execution of the note sued upon, that the promise of the Forge Company was a naked promise without any good and valuable consideration therefor, and that plaintiff is not a holder of the note in due course. Upon motion of the plaintiff, the amended affidavit of merits was stricken from the files, and the defendants electing to stand by it, a judgment as by default was entered against them for the amount alleged to be due.

For the reasons stated in the opinion this day filed in Gen. No. 29287, entitled Kithnick-Tumpeer Chemical Co. v. Union Drop Forge Company, in which the affidavit was, in substance, the same as in this case, the judgment of the Municipal Court is reversed and the cause remanded for a trial upon the issues presented by the plaintiff's amended statement of claim and the defendants' amended affidavit of merits.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

29 - 29101

JAMES R. MILLER,
Defendant in Error,

vs.

AMERICAN AUTOMOBILE UNDERWRITERS OF ILLINOIS,
Plaintiff in Error.

233 I.A. 605

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was brought upon a policy of insurance for fire and theft. The policy contained a provision requiring in the event of loss "the assured shall forthwith give notice thereof in writing, to the Exchange or the authorized agent **; and within sixty days thereafter, *** shall render a statement to the Exchange, signed and sworn to by said assured, stating the knowledge and belief of the assured as to the time and cause of the loss ***."

Defendant denied liability on the ground that no such notice was given and no such statement rendered within sixty days.

The judgment appealed from was for $2,461, entered upon a verdict for that amount.

It is incumbent upon plaintiff in such a case to prove the giving of such notice and the furnishing of such statement, or, when the issue is made, that defendant expressly waived such proof. (Gallagher v. American Alliance Insurance Co., 220 Ill. App. 476, 478.) Without such proof there can be no recovery,(Miller v. Milwaukee Mechanics Ins. Co., 181 Ill. App. 135) and we think plaintiff failed to make it.

Plaintiff lost his car August 7, 1921, under circumstances indicating theft. He testified that a few days later he mailed a letter to defendant at its office, and that on September 19, 1921, filled out and sent a report on a blank similar to the blank which had been enclosed to him in a letter from defendant on November 2,

and which he filled out November 9; that he made several calls at defendant's office and wrote it several letters, and was referred when he called to a Mr. Keen. He kept no copies of the alleged letters except one dated October 26, 1921, in which he stated that he had written defendant October 20 in regard to the policy but had received no reply, and desired to know the company's attitude. He did not state, or seemingly remember, the contents of the other letters, and would not swear that they were directed to the right address. The party who wrote for him the letters of October 20 and 26 was uncertain whether he had written a third or previous letter for plaintiff, as the latter claimed. This party and plaintiff were his only witnesses.

Mr. Keen, who had adjusted claims for defendant when requested and who had a desk in its office and with whom plaintiff claimed to have talked in September and on other occasions concerning his loss, testified that his talk with Miller was in November; that Miller said nothing about having made a report, and that he sent Miller a letter a few days later, on November8, which stated that defendant was enclosing one of the company's report blanks, and requested him to fill it out in detail as to the theft. The letter was introduced in evidence. Keen said he never heard of the claim or saw Miller prior to that month and referred him to Mr. Hall, defendant's president, as he had no power to adjust a claim until it was referred to him by Mr. Hall. This course of business was testified to by Hall, who said he never heard of the claim until in November, and by defendant's book-keeper, who testified that she made entries of claims when presented, and said that she entered plaintiff's claim in November immediately upon its being presented.

It appears that plaintiff offered in evidence a filled out notice of claim dated November 9, 1921, on one of defendant's report blanks, presumably the one enclosedin Keen's letter of

and which the filled out December 1; that he made several calls at Rafferty's office and spoke to several friends, who was returned when he called in a fr. Shoes. In each he spoke of the alleged letters among the dated October 30, 1920, in which he stated that he had written defendant Gaspere M. to repeat to the policy but had received no reply, and failed to have the company's attorney. In his own state, in essentially phrasing, the judgment of the lower court, and would not assert that they were alleged to the plaintiff claims. The party who wrote for him the letters of October 30 and 31 was accordingly unless he had written a letter or previous letter for plaintiff, in the letter therein. This letter and duplicate was his only witnesses.

Mr. Moss, who had objected during the defendant's cross-examination and who had a deed in his office and who then plaintiff claimed to have talked in December and of other conversations concerning his letter, testified that his late with Gaspere was in November; that Gaspere said nothing about having made a report, and that he had written a letter a few days before, on November, which stated that defendant was ignorant of the company's business, and requested him to file it, or in lieu of to the truth. The letter was introduced in evidence. There was no mention of the claim or any failure prior to that month and referred him to Mr. Hall, defendant's president, as he was to power to adjust a claim until he was referred to him by Mr. Hall. This course of business was testified to by Hall; the said he never heard of the claim until in November, and by defendant's witnesses, who testified that the made overtime of claims upon presented, and said that the mistrust plaintiff's claim in November immediately upon his being presented.

It appears that plaintiff attempt to institute a fifth cause action of claim dated November 9, 1921, or one of defendant's prior claims, presumably the one mentioned Hanff's letter of

November 8. While it is marked as "Plaintiff's Ex. B. for identification," it appears to have been received in evidence without objection. Plaintiff said it was similar to the previous report he claims was made out for him in September by one Sullivan, but which he admits was not sworn to. Neither report was in compliance with the policy; that of November because made more than sixty days after the loss, and that of September, whether received or not, because not sworn to.

The contention that there was a waiver of compliance with the requirements of the policy as to the oath and time of presentation is untenable. Waiver is a form of estoppel and nothing was done by defendant by which plaintiff changed his position or was induced to act otherwise than he did. Of course, if the evidence tended to show that defendant accepted the proofs of loss without being sworn to there might be a waiver of the informality. But there is no proof of such acceptance.

As the evidence did not establish the waiver we need not consider appellant's point that waiver was not pleaded. We think the verdict is against the weight of the evidence as to the presentation of a sworn notice of the claim within the time required by the policy and against the theory of waiver, even if in the state of the pleadings it could be considered.

The court having erred in not granting a new trial, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

40 28a

69 - 29156

HANNAH BILLINGS,
Defendant in Error,

vs.

MICHAEL HUCK,
Plaintiff in Error.

23 I.A. 605

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $5,000 in a suit to recover for personal injuries received, as alleged and claimed, from the colliding of two automobiles as the one driven by defendant was passing that being driven by one Tierney in which plaintiff was riding. Both were going northwest on a county concrete road 18 to 20 feet wide, having on its east side a shoulder of dirt about 2 feet wide, beyond which was a ditch.

The evidence for plaintiff was to the effect that, in so passing, defendant's car first hit the rear left side of Tierney's car causing a slight jolt, and that it then went to the left side of the road and turned quickly towards and against Tierney's car, which was continuing straight ahead about one to two feet from the edge of the road so that some parts of their front wheels collided, causing Tierney's car to go immediately into the ditch and upset.

This theory was supported by the testimony of Larson who sat at Tierney's right on the front seat, and by plaintiff and her mother and two boys who sat in the back of the car. The testimony indicates that Tierney was evidently killed.

Defendant's contention that there was never any contact of the two cars was supported by his testimony and that of his young son and little daughter.

of his young son and little daughter. Photographs of Tierney's car taken after the accident showed a small dent in the left rear fender and one on the forward left hub. There was evidence tending to show that the latter dent might have been caused by contact with a telegraph pole where the car lay in the ditch. Defendant's son also testified to a mark on the right rear fender of his father's car which was not there before the accident.

While the testimony was contradictory as to whether the cars came in contact it was sufficiently strong for plaintiff to justify the verdict. It would serve no useful purpose to review it for it cannot be justly said that the verdict is manifestly against the weight of the evidence.

Defendant's contention that there was no evidence of the ownership or operation of defendant's car by him - on which issue was taken - and that, therefore, the court erred in denying defendant's motion for a directed verdict is not supported by the record. It was immaterial whether he owned the car if, as charged, he was negligently operating it. Defendant not only referred to the car as his machine but frequently testified to operating it, saying: "I sounded my horn. * * * I speeded up to about 25 miles an hour to pass his car. * * I turned to the left to pass Tierney's car and I went past him. * * * I turned over pretty close to the left-hand side of the road. * * * I stopped my car and went back to help him." He used similar expressions indicating that he was driving and exercising control of the car at the time of the accident, and his son expressly referred to his father's driving the car.

It is also urged that the court erred in not sustaining defendant's motion to strike out that part of plaintiff's testimony describing the accident in which she said, referring to defendant's car, "that a terrific jar had sent us into the ditch," on the ground that it was a conclusion of the witness.

Even if it be not regarded as direct evidence of what she saw happen we do not think it reversible error. For the conclusion is so palpable from what she observed and from the testimony of plaintiff's other witnesses to the effect that they saw the front wheels come in contact and felt the jar therefrom and immediately the car went into the ditch, that the jury was justified in reaching the same conclusion regardless of the fact that plaintiff and other witnesses, whose testimony was not objected to, testified to the same conclusion.

While defendant testified that the cars never touched one another plaintiff in rebuttal proved by several witnesses that defendant subsequently said that he did strike Tierney's car and was sorry for it. This was proper rebuttal and impeachment upon a material matter, and not, as appellant contends, on an immaterial issue.

The amount of the verdict is not complained of, and we find no good ground for disturbing it.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

40 29a

108 - 29196

230 I.A. 605

M. J. DUYER,
Appellant,

vs.

LOUIS BRODY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff operates and maintains in a certain building in Chicago an establishment for physical instruction and training. On June 5, 1923, he entered into a written contract with defendant whereby he agreed to give defendant the privileges of said establishment and physical instruction and training for one year from that date, and defendant in consideration thereof agreed to pay him $150 in advance on the signing of the contract. The contract was signed by both parties but no money has ever been paid thereon.

At the trial, which was had without a jury in the following September, the contract was received in evidence on defendant's admission that he had signed it and had made no payments under it, and plaintiff testified that he had and still maintained such establishment and had been and was able, ready and willing to perform the agreement on his part. The defendant offered no evidence, and upon the facts so testified to the court's finding was for defendant, and this appeal is from a judgment for costs against plaintiff.

Appellee has filed no brief, and the only points he seems to have made below are that no damages were proven, and that the contract is without consideration.

The case is like that of Dwyer v. Graham, Gen. No. 28725, decided by this court March 11, 1924, but not reported. The contract there, like the one here, was for physical instruction and training for one year, in consideration of which the defendant agreed to pay $100 in advance on signing the agreement. We held it was not necessary to prove special damages, as the contract was entire and plaintiff was entitled to recover the whole sum agreed upon. Special reference was there made to International Text-book Co. v. Martin, 32 Neb., 403, and 92 Neb., 430, applying the principle where a contract was made for a course of instruction in a correspondence school to be paid for in advance, of which the defendant never availed himself. He was, nevertheless, held liable for the unpaid balance of the contract price. Other cases also illustrative of the principle were there referred to which may be found compiled in 51 L. R. A. (N. S.) 978, and 35 Cyc. p. 816.

The contention that there was no consideration is untenable. It is a familiar principle that the promise of one party to a contract may be the consideration of the promise of the other. It becomes necessary to reverse the judgment and enter one here for the amount claimed, namely, $150.

REVERSED AND JUDGMENT HERE FOR $150.

Fitch, P.J., and Gridley, J., concur.

114 - 29202

40 30n

236 I.A. 605

ROBERT L. LEFFINGWELL,
Appellant,

vs.

JOHN H. THOMPSON,
Appellee.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The sole question in this case is whether the court's finding against plaintiff is manifestly against the weight of the evidence.

Plaintiff, learning that defendant wished to sell his store, went to him some time in October, 1921, with reference to securing the agency to sell it. As to what took place between them then and subsequently with the purchaser Mueller, plaintiff's and defendant's testimony are not in accord. In reaching its finding the court evidently accepted the version of the facts as given by defendant and the purchaser, and in the absence of any corroborative circumstances we cannot say that a different version by plaintiff justifies us in making a different finding.

Defendant had already submitted the property to Mueller before plaintiff sought the agency of it, and according to defendant's version plaintiff was given the property to sell with the express understanding that defendant was to take care of any deal with Mueller. After further negotiations between defendant and Mueller and an offer by the latter of $18,000, plaintiff undertook to enter into negotiations with Mueller and suggested to defendant that as previous negotiations had been fruitless, a written proposition be presented to Mueller. One was accordingly drawn and signed by defendant with details as to terms, fixing the price at $24,000, and was taken by plaintiff to Mueller, who re-

fused, according to his testimony, to consider it and immediately handed the proposition back to plaintiff. This was some time in November. From that time on plaintiff discontinued efforts with Mueller, and the latter testified that he made no offer through plaintiff and that after he refused to consider the proposition nothing more was said between them. Plaintiff claims that his abandonment of further conferences with Mueller was at defendant's suggestion that if Mueller wanted the property he would eventually buy it. But even so the proposition he was specially authorized to submit was declined and never again considered. No further conferences took place until about the middle of January, when Mueller resumed his negotiations directly with defendant and apparently on his own initiative, offering him $30,000 for the store, which he finally accepted. The record discloses nothing plaintiff did which can be said to have influenced his action. Not only does Mueller in effect disclaim any such influence, but we cannot say that the court erred in accepting defendant's version of the understanding to the effect that plaintiff was to have no commission if any sale was made to Mueller unless he accepted said written proposition.

We find no occasion to discuss the law pertaining to the case, which resolves itself into one where the court was obliged to act on one version or the other of the agreement. We cannot say that defendant's version was against the manifest weight of the evidence.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

403/a

119 - 29207

WILLIS F. CLEMENT, Appellee,	23 I.A. 606
vs.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
CHICAGO UNITED THEATRES, Inc., Appellant.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for alleged breach of contract whereby defendant agreed to employ plaintiff for one year as manager of a theatre, and to pay him $50 a week and a bonus of three per cent of the net profits resulting from its operation during that period, which it guaranteed would not be less than $1200.

The term of the contract expired July 6, 1921. Plaintiff was discharged June 12, 1921, and the suit is brought for the salary for the last four weeks of the term and the bonus of $1200, a total of $1400, for which amount there was a verdict for plaintiff. The judgment entered thereon is appealed from.

No point is made either as to the rulings on evidence or instructions to the jury. The only question we are asked to consider is whether the verdict is not manifestly against the weight of the evidence as to whether defendant was justified in discharging plaintiff for alleged incompetency, lack of skill, neglect of duties and misconduct, with respect to each of which there was contradictory evidence. The right to discharge a servant or employe on such grounds is not questioned, nor that if the facts justified the dis-

charge no recovery could be had.

The burden was on defendant to show the existence of good grounds for the discharge. After a careful review of the evidence we are not disposed to disturb the jury's verdict. While there was evidence tending to establish some of the grounds relied on for the discharge the evidence is so contradictory on the subject that we cannot say the jury's verdict was wrong. The review of the evidence, pro and con, in detail would subserve no useful purpose and make this opinion as long as the argument. It is enough to say without detailing the various instances constituting the grounds of complaint that not only are some of them not supported in the evidence but such as found some impart therein were so flatly contradicted that we would not disturb the finding of the jury as to where the truth lay. We think the trial court properly left the facts as found by the jury.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

403 22

127 - 29216

238 I.A. 606

OSCAR C. HAGEN,
Appellee,

vs.

EDWARD J. LEHMAN, OTTO W. LEHMAN and EDITH M. EHRR, Trustees,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The question upon this appeal is whether the court properly struck defendant's affidavit of merits as not presenting a legal defense to the statement of claim. Defendants having stood by their pleading, judgment was rendered for plaintiff in the sum of $3,651, the amount claimed.

The statement of claim is based upon covenants of warranty in a deed from defendants to plaintiff against encumbrances, except as therein stated, the only pertinent exception being that the conveyance is made subject to "unpaid installments of special assessments which fall due after this date, levied for improvements completed; * * ." The date of the deed is March 22, 1923.

The statement of claim alleges that at the time of the making and delivery of the deed three installments of certain special assessments were due and liens upon the real estate conveyed, that the improvements for which they were levied had been completed, and that by reason of defendant's default to pay the same with interest plaintiff became obliged to pay the same in order to protect his title and possession.

The defenses set up in the stricken affidavit of merits are that prior to the execution of the deed the parties

entered into a written contract of sale of the premises which, as set out, contains the same language as the deed respecting the things to which the conveyance was to be made subject, and that at the time of making it plaintiff knew that said third installments had not been paid; that said unpaid special assessments "were payable up to and including July 31, 1923;" that it was understood and agreed by and between the parties that the quoted clause as to what the conveyance was subject, contained in both the contract and the deed, should include said unpaid special assessments; that they "did fall due after the date of the making of the deed," to-wit, July 31, 1923; and that it was a part of the consideration of the deed and inducement to defendants in making the same that plaintiff agreed to pay said unpaid installments after the date of the deed and before August 1, 1923.

Because in this city, where the premises are situate, the statute (Cahill Stats., ch. 24, par. 193) prescribes that the officer authorized to collect special assessments shall report such as are delinquent to the county collector on or before the first day of August after the January 2nd when they are declared by statute "to be due and payable" (id. sec. 167), it is argued by defendants that while the installments "are owing" January 2 of the year they fall due, and may be paid between then and the following August 1, and "must be paid" before August 1 to prevent being returned as delinquent, therefore July 31 is the date of maturity when they become "due;" that the statute should be so interpreted and the parties so understood; and if the statute be not so interpreted then the word "due" being used in different senses, meaning sometimes merely "owing" whether the debt is matured or not, and sometimes "matured,"

the words "fall due" as used in the deed are ambiguous and evidence outside the deed is admissible to show the intention and understanding of the parties.

We do not think the words "fall due," as used in the clause of the deed in question are ambiguous or uncertain in meaning. They refer particularly to special assessments and presumably were used in the sense in which they are employed in the statute relating thereto. When special assessments are payable in installments the statute (par. 167, supra) declares that:

> "The first installment shall be due and payable on the second day of January next after the date of the first voucher issued on account of work done, and the second installment one year thereafter and so on annually until all installments are paid. * * Interest on assessments shall begin to run from the date of the first voucher issued on account of work done as aforesaid."

The statute then provides:

> "On the second day of January next succeeding the date of the first voucher aforesaid so certified as aforesaid, the interest accrued up to that time on all unpaid installments shall be due and payable and be collected with the installment, and thereafter the interest on all unpaid installments then payable shall be payable annually, and be due and payable at the same time as the installment maturing in such year and be collected therewith. * * Any person may at any time pay the whole assessment against any lot, piece or parcel of land, or any installment thereof, with interest as provided herein up to the date of payment."

These provisions as to when installments and the interest thereon become "due and payable" are seemingly so explicit as not to require interpretation. They are expressly declared to be "due and payable" on a specific date, namely, on January 2, of each year. They are not merely declared to be payable, but due. While payment cannot be enforced by a public sale until a report of delinquency is made to the county collector, and such report must be made "on or before the first day of August in each year," (par. 193, supra) that date

is intended as the extreme limit within which the duty to make such report must be performed and not as the date of the maturity of installments. Hence a delinquency in payment may exist any time after January 2, and may be reported at any time thereafter before the following August 1st, but unless it continues to the time of application for judgment no sale will of course be ordered.

We think, therefore, that the installments in question matured and "fell due" on January 2, 1923, and that being before the execution and delivery of the deed, which was in March, 1923, and the improvements for which they were levied having been completed, said installments constituted encumbrances against which defendant by his warranty deed impliedly covenanted. (Cahill's Stats., ch. 30, par. 9.) The language of the deed relating thereto should be interpreted in harmony with the statute, whatever the understanding of the parties was. If there was a mistake with respect thereto it cannot be availed of as a defense in an action at law but only by a proceeding in equity. (Lloyd v. Sandusky, 202 Ill. 621, 623.)

But it is urged that an agreement by plaintiff before and at the time of executing the deed to pay such assessments as a part of the consideration may be shown by parol testimony, notwithstanding it varies or contradicts the written terms of the deed, and cases from the State of Indiana are cited in support of that contention, and reliance is placed upon some decisions in this State. But the general rule recognized, we think, by a majority of the courts, is, that in the absence of fraud, ambiguity, or mistake, parol evidence cannot be introduced to contradict, vary, or alter a written instrument which is complete on its face, if such evidence in any way affects the scope of an unqualified covenant in a conveyance of real property. Numerous cases so holding are collected in notes

on the subject in L.R.A. 1916 E, p. 221. While it is also a general rule that oral evidence is admissible to show the true consideration of a deed, yet authorities in this State recognize the rule that such evidence is not admissible where it has the effect to restrict the scope of any of its covenants. It was said in Redmond v. Cass, 206 Ill. 120: "In actions for breaches of covenants and the like where the evidence is not offered to vary the legal import of the deed or impair its effect as a conveyance, proof as to the actual consideration may be made." (p. 127.) It was also said in Russell v. Hobbins, 247 Ill. 510, referring to the latter case and the authorities there cited: "It is true that a consideration duly acknowledged in a deed cannot be contradicted by parol for the purpose of destroying the legal effect of the deed as a conveyance."

A leading case on the subject is Simmonsrich v. Wood, 145 Mass. 180, where in a similar action on a covenant against all encumbrances evidence was offered for the purpose of showing an oral agreement that the encumbrance created by an unpaid assessment was not within the covenant, and at the time the deed was given plaintiff as a part of the consideration promised to pay the same. The court said:

> "While for some purposes it is competent to show what the real consideration of a deed is, a party cannot, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with the deed, which will cut down or vary the stipulations of his written covenant. This would violate the well settled rule of law, which will not permit a written contract to be varied or controlled by such testimony."

This case has been cited with approval in various states. (Bruns v. Schreiber, 43 Minn. 469; Ohlert v. Alderson, 86 Wis. 433; Rooney v. Koenig et al., 80 Minn. 483; and Williams v. Johnson's Estate, 177 Mich. 500.) In the Michigan case the court notes that in applying the rule permitting parol testimony to show the real consideration of a deed, a distinction must be observed

between a case where covenants therein are to be construed and one where consideration of the deed alone is involved. Such we think is the main distinction to be noted in the cases of Lloyd v. Sandusky, 203 Ill. 621; Brassard v. Lowe, 209 Ill. 405; Denny v. Holden, 121 Ill. 130, and other Illinois cases cited by appellants, most of which are considered in the Sandusky case. While they adhere to the settled rule in this state that the true consideration of a deed may be shown by parol evidence, yet in none of these cases, as we view it, did the admission of such evidence operate to defeat or negative any covenant of the deed. The question under consideration in the Sandusky case, the principal one relied upon, was whether the plea tendered a sufficient defense to an action for breach of seisin so far as the question related to consideration and damages, but the court recognized the law to be as stated in Rawle on Covenants for Title, 4th Ed. p. 358, where the author after stating that oral evidence was admissible either to show that the actual consideration was greater or less than that expressed in the deed, added: "It is clear such evidence is admissible solely in mitigation of damages, and not for the purpose of negativing a breach of the covenant." (See Sandusky case, supra, p. 633.)

The deed being a warranty deed in the statutory form and so with an implied covenant against encumbrances, except as therein stated, and the conveyance being subject to unpaid installments of special assessments levied for improvements completed which fell due after the date of the deed, the effect of the deed was to covenant against special assessments which fell due for completed improvements before its date. Hence admission of evidence showing a previous or contemporaneous agreement with defendant to pay the latter would manifestly affect the terms of the deed and negative its covenant against such encumbrances.

We think the rule recognized as above stated in the Redmond and Robbins cases, supra, states the law as it obtains in this state on that subject and forbids the admissibility of such evidence, and that the previous decisions of the Supreme Court, cited by appellants, were not intended to conflict with that rule.

As the defense set up in the affidavit of merits as to when the special assessments fell due was merely an erroneous conclusion of law, and as the defense in other respects could be supported only by evidence which would tend to limit the scope of the terms of the deed and negative the covenant against encumbrances, it was properly stricken.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

4032

145 - 29234

NIAGARA AUTO LIVERY & GARAGE COMPANY, Inc., Appellee, vs. WILLIAM S. BROMLEY, Appellant.	230 I.A. 606 APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $800 for damages sustained by plaintiff from a collision between its automobile and one operated by defendant, while the former was going south and the latter north on Clark street, Chicago, at eleven o'clock at night.

At the place of the collision is a double line of street car tracks on the east side of the street, leaving a thoroughfare west of them of from 30 to 40 feet in width for automobiles and other vehicles. Plaintiff's car was being driven south near the middle of the thoroughfare at about 18 miles an hour, and defendant's car north on the west or southbound car track at a speed estimated to be somewhat faster. The latter turned to the west into the thoroughfare causing the left sides of their fronts to collide. The accident took place about 100 feet south of Center street which opens into Clark from the west and from which the car tracks turn southward into Clark.

It was the claim of defendant that he was forced to leave the car track because a street car was coming around the corner from Center street; that a yellow cab was running north at his left behind him for which he slowed down and then turned behind it into the thoroughfare and at the same time

into plaintiff's car which he had not observed until that moment.

The negligence charged against him in various counts is careless operation of his car at a dangerous rate of speed, and while intoxicated, and without having his lamps lit. These charges were controverted but there was evidence to sustain them if believed by the jury.

Defendant contends here that plaintiff was guilty of contributory negligence in driving so near the west car track, and that the evidence does not show any real fault on the part of defendant.

This theory of the case is based on plaintiff's evidence that its car was 20 feet east of the west curb of the thoroughfare and defendant's testimony that the thoroughfare was 30 feet wide. But plaintiff's driver testified that its width was 40 feet or more and that he was near the middle. If the latter's testimony was true defendant had some 20 feet within which to turn safely and avoid the collision. There appears to have been no reason why in the exercise of ordinary care he should not have seen plaintiff's lighted car before he turned into it, and have turned to his right instead of the left. If the jury believe plaintiff's evidence to the effect that defendant was intoxicated and turned because he thought he had reached Center street, - as a remark of his right after the accident might indicate - and that there was no other vehicle going north and the yellow cab was going south, and that he turned suddenly while running at a speed of 30 miles or more an hour into plaintiff's lighted car, which he should have seen in time to avoid the accident, then there is no ground for disturbing the verdict so far as the evidence relating to liability is concerned.

Defendant also argues that references to an "invisible

defendant" in the argument by plaintiff's counsel to the jury is ground for reversal. But no objection thereto was made or ruling of the court asked for.

The damages are claimed to be excessive. Even if that point could be said to have been saved in the errors assigned the damages assessed appear to be much less than plaintiff's evidence called for. Defendant's expert witness on the cost of repairing the automobile testified that it would approximate $283 and the loss of the use of the car while undergoing repairs would upon the uncontradicted testimony given easily account for the rest of the damages assessed.

Without undertaking to review the evidence heard on that question, which was not objected to, and the instructions bearing on the same, on which error is predicated, we think it enough to say that while the instructions may not all be technically correct they are not such as would justify a reversal, or the belief that the jury was misled as to the questions at issue.

Accordingly the judgment is affirmed.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

403Ha

154 - 29243

235 I.A. 606

ANNA COHN, Appellee, vs. THOMAS A. HARRISON et al., etc., Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit is based on fraud and deceit in obtaining a deposit of money from plaintiff upon a real estate contract, in which a judgment was rendered in her favor.

Some of the points relied upon for reversal relate to the weight and sufficiency of the evidence. But as the bill of exceptions contains no motion for a new trial they are not open for our consideration. Not only is a motion for a new trial necessary for such a purpose but it must be included in the bill of exceptions. (Yerkes v. C. & A. Ry. Co., 235 Ill. 589, 597.) It is urged by appellants that since the amendment of section 81 of the Practice Act dispensing with the necessity of taking exceptions to adverse rulings, no occasion exists any longer for including a motion for a new trial in the bill of exceptions. Whatever force there may be to that argument the Supreme Court has since that amendment held to the former rule that a motion for a new trial, in order to become a part of the record, must be contained in the bill of exceptions. (Anderson v. Karstens, 297 Ill. 76, 79.)

The judgment, however, exceeds the ad damnum by $300. The entry of such a judgment is held to be reversible error. (Kelley v. Third National Bank of Chicago, 64 Ill. 541; American

Exchange Bank v. Mitchell, 179 Ill. App. 612.

The court also received incompetent and prejudicial evidence over defendants' objection. Plaintiff was permitted to testify as to her inexperience in real estate transactions, and that after making the deposit of $2,000 she was not able to purchase the same at what she claimed was to be the contract price. There was also testimony by her to the effect that she ascertained by a conversation, not had in the presence of any of the defendants, that the rentals of the property in question were not what they were represented to be by one of the defendants. Such a conversation, of course, was not binding on him or them.

Were it not for these errors there might be a remittitur of the judgment to the amount of the ad damnum, the evidence not being reviewable as to its weight and sufficiency in the absence of preserving the motion for a new trial in the bill of exceptions. But in view of such errors the judgment will be reversed and the cause remanded.

The points raised as to plaintiff's failure to amend in accordance with his notice by changing his action from tort to assumpsit, and by increasing the ad damnum, need not, therefore, be considered.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

403 Ia

166 - 20255

235 I.A. 607

LEONARD POMENTY, Administrator, etc.,
Appellee,

vs.

DIAMOND CAB COMPANY, a corporation, and JACK SMITH,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for the death of a young man eighteen years old, resulting from his being run into by a taxicab belonging to the Diamond Cab Company and driven by the defendant Jack Smith.

The cab was going south on Halsted street. Plaintiff's evidence, as given by three boys, twelve, ten and eight years old, respectively, tended to show that the deceased was crossing said street from the west on the north side of Willow street, intersecting it, and was struck by the left front fender of the taxicab while he was standing between the street car tracks on Halsted street waiting for a northbound street car to pass.

The evidence for defendants, given by Jack Smith and a former chauffeur of the Diamond Cab Company who was also driving a Diamond cab behind and a little to the west of Smith's cab, was to the effect that deceased came hurriedly from the northwest corner of the intersection and ran into the right side of Smith's cab. The accident took place after dark. According to witnesses for plaintiff these cars were being driven "pretty fast", without lights or blowing of horn, about 125 feet north of the street intersection when deceased left the sidewalk.

Smith and the other chauffeur's testimony was contradictory of these contentions. Because there was testimony by some of plaintiff's witnesses that the body of the deceased fell towards the west, thus tending to substantiate defendants' contention that deceased was struck by the right instead of the left side of the cab, yet if the testimony of the boys to the effect that deceased had left the sidewalk and was standing between the car tracks waiting for the northbound car to pass when the cab was 125 feet north of the intersection, and that he had waited for the southbound car to pass, which defendant Smith admitted was ahead of him and for which he claimed to have slowed down, defendant Smith by the exercise of reasonable care, knowing that persons might be crossing the intersection, should have been able to avoid the accident.

Of course, if the boy ran and jumped against the cab in an effort to get ahead of it he was guilty of contributory negligence. Whether he was or not was a question the jury had to decide from conflicting evidence, and we are not convinced that their verdict was against the weight of it, which is the only question for us to decide.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

194 - 29283

403 a

235 I.A. 607

CHARLOTTE CLARA MAISON HINZ,
Appellant,

vs.

CYRIL CHARLES MAISON,
Appellee.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered upon a verdict directed for defendant at the close of all the evidence. The suit is brought to recover back alimony awarded in a judgment rendered in her favor in the State of Ohio. After introducing the record of the Ohio judgment, rendered October 4, 1919, awarding her alimony of $5 per week, and proving defendant's failure to pay the alimony except a small part thereof, plaintiff testified that in 1919 she came to Chicago from her home in Cleveland, Ohio, accompanied by an attorney from that place, for the purpose of collecting the back alimony; that shortly after reaching a hotel here and while checking her baggage she was accosted by a detective from the state's attorney's office and told that she was subpoenaed there to testify; that she stepped across the lobby to speak to her attorney and found him with another detective who had informed him to the same effect; that they were taken to the state's attorney's office by said detectives, where they were separately questioned and brought into the presence of an assistant state's attorney, who told them that they were under the serious charge of trying to extort money, and that they had "better effect a settlement and beat it out of town" or they "would both be put in the cooler;" that thereupon they went to the office of one of defendant's attorneys, accompanied by one of said detectives, who remained there pending an alleged settlement of the alimony claim of $2,255 for $250, for which plaintiff and

her attorney were asked to sign, and did sign, a prepared receipt and release in full of all claims against defendant whatsoever, and thereupon they immediately left Chicago for Cleveland.

It is immaterial that some of these facts were controverted if there was any evidence which tended to show the release was procured by duress. That there was such evidence is hardly open to question. Every circumstance indicated a prearrangement, which in fact was admitted by defendant, to take plaintiff and her attorney into custody upon the claim that they had committed some criminal offense and to permit them to go free if they consummated some arrangement satisfactory to defendant. One of defendant's attorneys was also there aiding in the scheme and assuming to urge a criminal charge, and came back to his associate's office to aid in procuring the alleged settlement and release. As tending to show that they were still in custody and not free from the hands of the law, one of the detectives accompanied them and remained in their presence until the papers were signed and delivered.

The weight of the evidence as to whether under such circumstances plaintiff acted under duress in executing the release, was not for the trial court, and is not for us, to determine. The evidence having the unquestioned tendency to establish the claim of duress the case should have been submitted to the jury.

In so holding we cannot refrain from expressing surprise that such procedure should seemingly have had the sanction of a public official.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

4037

215 - 29302

235 I.A. 607

MAGNUS CHICAGO COMPANY,
a corporation,
Appellant,

vs.

A. J. GAVOLIS,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago vacating and expunging a judgment. The suit was begun in replevin and after return to the writ showing personal service on defendant, demand for the property, refusal to comply therewith and failure to find the property, it was changed to trover by filing a statement of claim charging unlawful and malicious conversion of the property with intent to cheat and defraud plaintiff. On the next day after it was filed, which was the return date for the replevin writ, the court entered a judgment on findings in accordance with said statement of claim.

More than thirty days thereafter defendant, who had been served with a capias ad satisfaciendum in the meantime, presented a petition to expunge or vacate said judgment and to quash said capias, alleging as grounds therefor certain deficiencies in the record, the change of the form of action without leave of court or notice to him and without a rule on him to answer the tort, also a denial of any act which could be made the basis of the changed action, and in fact that the court was without jurisdiction to enter the judgment.

Appellant urges that the petition does not set forth grounds for equitable interference under section 21 of the

Municipal Court Act and, therefore, the court was without power to vacate the judgment thirty days after its entry. Appellee disclaims that the petition was filed under said section, but that upon the facts stated it properly invoked the common law power of the court to expunge a void judgment.

While it is apparent that the petition sets forth no facts constituting fraud, accident or mistake or anything which would warrant the exercise of the equitable power conferred upon the Municipal Court by said section 21, yet the order entered upon the petition, whether resting upon the court's equitable or common law powers, is not a final order, and, therefore, not appealable. The effect of it is to leave the case still pending for final judgment, which, if brought here for review may then bring before us the merits of the present controversy. Accordingly the appeal must be dismissed.

APPEAL DISMISSED.

Fitch, P. J., and Gridley, J., concur.

40384

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PEOPLE OF THE STATE OF ILLINOIS ex rel. FELIX STREYCKMANS et al.,
Appellees,

vs.

VILLAGE OF WINNETKA, a Municipal Corporation, et al.,
Appellants.

235 I.A. 607

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment granting a writ of mandamus ordering the president and board of trustees of the Village of Winnetka to approve a plat of a proposed subdivision of property in said village which said village authorities refused to approve or accept on the ground that section 416½ of chap. 38 of the Village Code entitled "Plats" had not been complied with.

It is not questioned that otherwise the plat complies with all the requirements of the statute relating to plats and all other ordinances of the village regulating the platting.

The main question presented by the record is as to the validity of said section 416½. Said section requires before any map, plat or subdivision of any block, etc., lying within the corporate limits of the village shall be approved by its council the owner thereof shall be required to enter into a contract that he will upon the approval of the map, etc., install a surface water drainage system of and for such block, etc., the course and extent of which shall be clearly shown upon the plat and concerning which surface or water drainage system the superintendent of public works shall have issued and filed with the village clerk a certificate stating that the system shown upon the plat is adequate to drain the lands represented on the plat; and con-

cerning which the village officer shall have issued and filed with the village clerk his certificate stating that the lands so represented will when provided with such system of drainage render them healthful for human habitation. It requires the system to be installed shall consist of ditches, drains or sewers of such capacity as to adequately drain the land shown on the plat, providing adequate drainage has not theretofore been provided.

After the petitioner had made a prima facie case respondent introduced said section in evidence, and then offered to prove by the president of the village and certain members of the village council, its health officer and others that the land was a part of a considerable area of practically swamp land, dry during the summer season, having a low level above city datum, and within a foot or two of the level of the lowest property along the line of the Skokie valley at the bank of the Skokie River, which lies about half a mile west of the land in question; that the valley in which the land lies is a strip, practically level, separated from Lake Michigan by a ridge about a mile wide which reaches a height of some 80 feet above village datum; that the only method of drainage of the proposed subdivision was by surface ditches, one running towards the Skokie River towards the west, and the other into Lake Michigan through a village south of Winnetka; that the drainage of surface water was wholly inadequate to make it possible to live on the land in a sanitary dwelling without some drainage system other than the existing one; that for several weeks in the spring and fall the ground is largely overflowed by a large amount of water, sometimes over a foot in depth in some places; that the land is covered with marsh, grass and weeds, and that there is no terrace or anything suggesting a terrace such as the proposed name of the subdivision, "Rosewood Terrace Subdivision," would indicate; that the name of the

subdivision was deceptive and calculated to deceive proposed buyers, especially those who viewed the same in the summertime when dry; that the land is unhealthy and unfit for human habitation without some effective method of drainage being put in operation. Objection to the offer having been sustained the court entered the judgment appealed from, finding that section 416½ aforesaid was void and directed the issuance of the writ requiring respondents to approve the plat.

We think the court's rulings were correct.

It is the contention of appellants that the ordinance in question is within the power conferred by the Cities and Villages Act to pass all ordinances which will be conducive to the promotion of the health, safety and welfare of the inhabitants including that which would prevent deceit or fraud upon the public. Neither the existence nor proper exercise of such power is questioned. But it is urged by appellees that the ordinance in question is unreasonable and void because it abridges the statutory right given the owner to subdivide his lands and make a plat thereof as provided by chap. 109 of the Revised Statutes entitled "Plats".

The act in relation to plats was supplemented by sec. 5 of article X of the Cities and Villages Act, (ch. 24, par. 240, Cahill's Stats. 1923) conferring upon the city council or board of trustees the right to regulate subdivisions of property within corporate limits by requiring the approval of the plats thereof by said council or board, or officer designated by it, before it should be recorded or have validity. This act has received construction in People v. Village of Mounds, 172 Ill. App. 449, and People v. Mansfield, 200 Ill. App. 86, and 279 Ill. 215.

While the principal question presented in these cases was whether municipal authorities had the absolute right and dis-

cretion to approve or disapprove a plat presented for approval - the refusal to approve having been based in neither case upon a failure to conform to the statute or any ordinance - yet the construction there given to the act governs, we think, the instant state of facts.

In the Village of Mounds case the court said:

> "Within the language of the statute it is the plat and nothing more that is to be submitted for approval. The land belonged to the relator. His right to subdivide and plat it is a substantial right sanctioned and regulated by chapter 109, but it was given to the village board to see that the plat was made in compliance with the statute and in conformity with any reasonable regulations or requirement by ordinance respecting the size of the blocks and lots, the direction and width of the streets and alleys, or other detail of the survey. In our opinion this is the extent to which discretion was given to the board."

This decision was followed by the Appellate Court in the Massieon case and in affirming the latter the Supreme Court said:

> "The city council may by ordinance require every such plat to be submitted to the council itself for approval or it may authorize the approval by some designated officer of the city. To this extent the right of the owner to have the plat of the subdivision of his land recorded and to sell his land with reference to such plat is limited, but no farther. There is no absolute discretion in the city council as to the approval of a plat. It may by ordinance, no doubt, regulate the direction and width of the streets and alleys and the location of public grounds and require conformity with existing subdivisions, streets and alleys, but such regulation must be by a general ordinance applying to all alike."

These decisions are the only authoritative declarations on the subject in this state but are in harmony with decisions construing similar statutes in other states. (See cases referred to in the Massieon case, 200 Ill. App. p. 95.)

The last quoted language of the Supreme Court in the Massieon case implies that there being no absolute discretion in a city council or village board or its designated officer to approve or disapprove a plat it must be approved (1) if it conforms to ordinances regulating streets, alleys, public grounds

and existing subdivisions, and (2) if the ordinances making the regulations apply to all alike.

No question is raised here that the plat does not meet the first required condition. But as it does not comply with the ordinance respecting a contract for surface drainage the question presented is whether the ordinance is not discriminatory and does not abridge the right conferred by statute.

It must be recognized that the mere act of surveying the land and making and filing a plat thereof does not change its status or condition. Whether it be swamp land or disconnected from other subdivisions or uninhabited land its character as such remains the same as before platted until some act is done to effect some physical change. If any change by the owner should in any way produce a nuisance or unsanitary condition it would be remedied by exercise of the village police power but only by a "general ordinance applying to all alike." But the ordinance in question is not of that character and no other is relied upon. It manifestly discriminates between platted and unplatted lands of the same character and condition and has no distinct relation to the mere act of platting. The effect of the act, therefore, is to impose restrictions upon the statutory right to plat one's land not required generally as to all lands of a similar character and situation. It manifestly annexes conditions to the right of platting not contemplated by the statute.

The land in question appears to be a part of a large tract of low land within the corporate limits of the village presenting problems of drainage, which can certainly, as conceded, be met by special assessments or under laws providing for drainage. It would be unreasonable, even if it were practicable, to require a separate drainage system for each subdivision after it has been platted. To install an adequate one for the property in question would seem to require an extension of facilities across other

private lands. The ordinance is unreasonable.

As to the contention that would-be purchasers might be deceived by the name "Homewood Terrace," given to the subdivision, and by viewing the land when dried by summer heat, we think it enough to say that even if these facts fall within the power of police regulation they afford no ground for refusing to approve a plat which apparently conforms to all regulations as to streets and alleys and location of public grounds, and, so far as appears from the record, is not in conflict with any general ordinance affecting all lands similarly situated.

The court's order will be affirmed.

AFFIRMED.

Gridley, J., concurs;
Fitch, P. J., dissents.

MR. PRESIDING JUSTICE FITCH DISSENTING:

I think the judgment should be reversed and the cause remanded because, regardless of the validity of the village ordinance, the court erred in refusing to admit the offered evidence. The only natural and probable inference to be drawn from the making and recording of such a plat as that made by the relators is that they desired and were about to place such lots on the market for sale for building purposes. The offered evidence would have a tendency, at least, to prove that thereby a fraud on the public was contemplated in the sale of worthless lots which, instead of resembling a "terrace," or being in a "rosewood," as suggested by the name of the proposed subdivision, are in fact marshlands, without a rose or a tree of any kind upon them, and covered with water a good part of each year so that they are unfit for human habitation. If the making and approval of such a plat would tend to mislead and deceive prospective purchasers I think a writ of mandamus should be denied. It is to be remembered that such a writ is not a writ of right. "The writ is to be granted or withheld in the exercise of a sound judicial discretion in view of all the existing facts and with due regard to the consequences which will result." (The People v. LaRay, 305 Ill. 31, 16; Meaney v. Meaney, 293 Ill. 370; The People v. City of Rock Island, 215 Ill. 488; The People v. Olson, 215 Ill. 680; The People v. Board of Supervisors, 185 Ill. 208; The People v. Ketcham, 72 Ill. 212.)

48 - 29130

ALANSON C. NOBLE, Appellant,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
vs.	
QUIN O'BRIEN, Appellee.	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Alanson C. Noble, complainant, seeks to reverse a decree of the Circuit Court of Cook County, entered on October 24, 1933, after a reversal of a former decree and a remandment of the cause with directions.

Noble's original bill against O'Brien for an accounting for attorneys' fees, etc., was filed on August 27, 1914. After a protracted hearing before a master a decree was entered on October 14, 1930, adjudging that O'Brien pay Noble the total sum of $7,376.46, together with interest thereon from the date of the decree, and two-thirds of the costs of the litigation. Said total sum was made up of the following items: (a) Net principal sum found due Noble on the accounting, $4,995.66; (b) interest thereon at 5% per annum from August 27, 1914 (date bill was filed), $1,533.99; (c) transcript furnished the master, over and above complainant's, $157.65; (d) excess paid the master by the receiver out of Noble's share of a certain escrow fund, $688.94. Thereafter O'Brien sued out a writ of error from this appellate court to reverse the decree, and, on March 31, 1932, it was reversed, and the cause was remanded "with directions that the account be re-stated and modified in all of the particulars above mentioned" (viz, in the opinion filed, but not published in full); "that except as to these particulars the accounting stand; and that, after said account has been so re-

stated, a new decree be entered accordingly." Noble's application to the Supreme Court for a writ of certiorari was denied. (Noble v. O'Brien, 224 Ill. App. 652.)

In the year 1905 Noble and O'Brien were attorneys at law in Chicago. Noble's practice was largely devoted to chancery causes, while O'Brien was engaged in other legal work, particularly in the trial of tort cases before a jury. They occasionally assisted each other in their work. About May 1, 1907, Noble moved his office into the suite then occupied by O'Brien in the Unity Building, and a verbal agreement was entered into between them whereby each was to render legal services to the other in trials and others matters when requested, but the basis of compensation was not fixed. Thereafter and until about May 1, 1910, Noble assisted O'Brien in some of the latter's cases and O'Brien rendered similar assistance to Noble, and for these services each was equitably entitled to be paid out of the net fees received. In 1910 differences arose regarding finances and the adjustment of their accounts which finally resulted in the present litigation. Noble admitted on the hearing before the master that in all of his cases, which he called O'Brien into, the latter was entitled to one-half of the net fees received. The main dispute was concerning O'Brien's cases. Noble claimed that in these cases he was entitled to one-half of the net fees received. O'Brien, on the contrary, claimed that when Noble moved into O'Brien's suite it was expressly agreed that Noble was to receive, as compensation for such services as he might render O'Brien in the latter's chancery and contract cases, his office rent and office expenses. The circuit court in the former decree, following the report of the master, denied O'Brien's said claim and entered a finding to that effect, which particular finding was expressly affirmed in the writ of error case. The circuit court also found in substance that the parties worked together in the various cases enumerated in the master's

account; that each case was a joint venture or undertaking with no definite agreement as to the division of profits or losses; and that "the law fixes the division of profits and sharing of losses in such such case share and share alike." The net principal sum, $4,995.66, allowed to Noble in the former decree, was arrived at by allowing him one-half of all the net fees collected in the "O'Brien" cases in which he (Noble) had rendered services. In the writ of error case O'Brien vigorously contended that the circuit court had erred in awarding an equal division of the fees in such of the "O'Brien" cases as were enumerated in the master's account, and for the reason that the evidence disclosed that in several "O'Brien" cases, which had been settled and disposed of and which were not enumerated in the master's account and in which Noble had rendered services, Noble had knowingly accepted in full settlement for his services in each of said cases about one-fourth, or less, of the net fees received, which acts of Noble precluded the presumption that the net fees received in all "O'Brien" cases in which Noble rendered services should be divided equally. This phase of the case was considered at length in our former opinion, and, after discussion and citation of authorities, it was there said: "We are of the opinion under all the evidence that the basis of the accounting as to the net fees in the 'O'Brien' cases, enumerated in the master's report, should have been so fixed as to award Noble one-quarter of said fees, instead of one-half, and that the final decree of October 18, 1920, should be reversed, and the cause remanded with directions that the account be re-stated and modified accordingly." This was one of the "particulars mentioned" in the opinion wherein the circuit court was directed to modify the decree. Three other modifications were directed to be made: (1) In the former decree interest, to the amount of $1,533.99, was allowed Noble on said

net principal sum of $4,995.66. We expressed the opinion that such allowance to Noble for interest was improper, and directed that on the re-statement of the account no interest be allowed to either party. (2) In the former decree the costs of the litigation, including the master's fees, were taxed two-thirds on O'Brien and one-third on Noble. We directed that on the re-statement of the account the costs should be taxed equally between them. (3) In the former decree the circuit court allowed the master for his fees the sum of $5,300.98, which had been paid him. We expressed the opinion that this allowance was excessive, and directed that on the re-statement of the account he be ordered to return $1,330 to the clerk of the court, subject to future disposition by the court.

In July, 1923, the cause was re-docketed, and on October 22, 1923, an order was entered by the circuit court wherein, after stating that the master had volunteered to refund $1,330 of the fees received by him, he was directed to deposit said sum with the clerk, the same to be held for the benefit of the parties litigant, subject to the further order of the court. He immediately deposited the money. On October 24, 1923, the decree appealed from was entered. It appears from the certificate of evidence that several hearings were had relative to the provisions of the decree, and both parties presented tentative drafts; that the draft presented by O'Brien was finally adopted by the court with certain changes; but that neither party contended that a re-reference to a master was necessary in order to properly re-state the account, or made any request for such a reference.

In the decree the court found that it was not necessary to refer the cause to a master to re-state the account, as the items were simple, etc., and proceeded itself to re-state the account, and on such re-statement, in compliance with the mandate and after itemizing the cases, found that there was due to Noble

from O'Brien the total sum of $4,666.39 (instead of $9,923.97) and that there was due to O'Brien from Noble the total sum of $4,355.56, leaving a net balance due Noble, on the date of the filing of his bill, of $311.33. And the court, in further compliance with the mandate, did not allow to either party interest on any of the items, or to Noble interest on said balance.

And the court further found that certain moneys deposited in escrow with a trust company as receiver, less an escrow fee of $100, and a receiver's fee of $25, amounted to $4,215.10, of which sum each party was entitled to one-half, or $2,107.55; that under orders of court, entered in May and July, 1930, the receiver out of this fund had paid the master for fees the total sum of $3,950.98; that there remained in the fund a balance of $264.12, which at the time of the entry of the former decree had been paid to Noble.

And the court further found, in further compliance with the mandate, that all costs of the litigation, including master's fees and for transcript of the testimony furnished him, should be borne equally by the parties; that such transcript was necessary for the adjudication of the cause; that both parties had contributed to the payment of the same; and that O'Brien was entitled to recover from Noble the sum of $56.40 to equalize their respective payments.

And the court further found that the master had been paid as fees the total sum of $5,300.98 - $3,950.98 out of said escrow fund, $800 by Noble and $750 by O'Brien; and further found, in further compliance with the mandate, that said total payment was excessive to the extent of $1330, and that the master's total fees should be fixed at $3,970.98.

And the court further found that O'Brien, being liable for one-half of the master's fees, $1985.49, and having paid the master $750, was liable for a balance of $1235.49, but that, in-

asmuch as all of O'Brien's share of said escrow fund had been paid to the master by the receiver under said orders of court, he, (O'Brien) "is entitled to a refund of the difference of the above balance of $1255.49, which he had owed the master, and said share of said escrow fund belonging to him ($2,107.55), which difference amounts to the sum of $872.06, which the court finds is said O'Brien's portion of said refund of said $1330" (made by said master on October 22, 1923, as above mentioned.)

And the court further found that out of Noble's share of said escrow fund the master was paid $1843.43, being the balance which was due the master from him of $1385.49 ($1985.49 less $600 previously paid) and an excess of $457.94, which said sum of $457.94 is Noble's share of said refund by the master of $1330.

And the court further found that O'Brien should be given credit as against Noble for said $56.40, above mentioned, and the same should be deducted from said net sum of $311.54, as above found due from O'Brien to Noble on said accounting, thereby reducing said net sum to $254.93, which sum should be charged against O'Brien's portion and added to Noble's portion of said $1330, thereby increasing Noble's portion to said refund to $712.87 and decreasing O'Brien's portion therein to $617.13. And the court further equalized certain small costs mentioned, so that finally the court found that Noble's portion of said refunded sum of $1330, amounted to $719.87 and O'Brien's $610.13.

And the court further found from evidence introduced that this appellate court, in the disposition of said writ of error case, on March 21, 1922, had entered a judgment for costs, against Noble, and in favor of O'Brien, in the sum of $1281.10, which judgment was still unpaid. And the court further found that all sums in the decree found due from O'Brien to Noble had been paid and satisfied; that O'Brien was entitled to receive

the entire sum of $1330, refunded by the master and in the clerk's hands; that of said entire sum he was entitled to $610.13 in his own right by virtue of the previous findings in the decree; and that he was entitled to said balance of $719.87, as and for a partial payment by Noble on said judgment for costs.

And the court decreed that the clerk of the circuit court pay over instanter to O'Brien said entire sum of $1330, in discharge of O'Brien's interest in his own right in said fund to the extent of $610.13, and the balance, $719.87, in partial satisfaction of said judgment of $1381.10 against Noble for costs; that the clerk take duplicate receipts from O'Brien, etc.; that the cross-bill of the defendant, John M. Duffy be dismissed for want of equity; and that the clerk after making said payments satisfy all circuit court costs as having been paid.

In the present appeal case, after the transcript of the record had been filed in this appellate court, Noble, appellant, moved that the record in the former writ of error case be considered as part of the record in the present case, and O'Brien asked leave to file in the present case, copies of Noble's additional abstracts and cross-errors filed in said writ of error case, also copies of Noble's briefs in said case, and also a copy of Noble's said petition to the Supreme Court for a writ of certiorari. The decision on these motions was reserved to the hearing. They will all now be allowed.

It is first contended by Noble that the decree appealed from should be reversed because the circuit court did not correctly interpret the mandate or comply with the directions of this appellate court made when the former decree was reversed and the cause remanded. By our former opinion and mandate we directed (1) that upon a re-statement of the account Noble should be allowed one-quarter, instead of one-half, of the net fees received in the "O'Brien" cases enumerated in the master's report; (2) that no

"O'Brien" cases enumerated in the master's report; (2) that no

interest on any items or on any net balance found due to either party be allowed; (3) that the costs of the litigation, including master's fees, be taxed equally between the parties, instead of two-thirds on O'Brien and one-third on Noble; and (4) that the master be ordered to refund, out of the fees paid him, the sum of $1330, for the benefit of the parties litigant, and subject to future disposition as ordered by the circuit court in the new decree to be entered. And we further directed that "except as to these particulars the accounting stand" and that, after the account had been so re-stated, "a new decree be entered accordingly." After a careful review of the proceedings of the circuit court after the cause was re-docketed, and of the new decree, we think that the mandate was sufficiently complied with and that the new decree does substantial justice between the parties.

It is also contended that, even if our directions should be held to have been sufficiently complied with, the circuit court erred in attempting to itself state the new account according to these directions and in not re-referring the cause to a master for such purpose. We cannot agree with counsel. We understand it to be the law that, where a cause is remanded with specific directions to re-state the account and make changes therein in certain mentioned particulars, and the proofs previously taken furnish all the necessary data, and nothing is required of the court but to make computations and enter a new decree, no re-reference to a master is necessary. (Voorhees v. Mason, 122 Ill. App. 569; Cook v. Moulton, 64 Ill. App. 419, 422.) In the present case all that was required of the court was to make certain computations in order to comply with the directions. Furthermore, it does not appear that Noble, on any of the hearings preceding the entry of the new decree, asked that the cause be re-referred to a master. On the contrary he presented a proposed draft of a decree which he urged

the court to enter. As to that portion of the decree which directs the payment to O'Brien of $719.87 (being Noble's share of the master's refund in the hands of the clerk) in partial satisfaction of the judgment against Noble for costs in this appellate court, it is stated in Noble's printed brief and argument: "As a matter of equity Noble took the position in the lower court that it was right and highly proper for the lower court to award O'Brien any moneys coming to Noble on the re-accounting to apply on the judgment against Noble in the appellate court for the costs in the writ of error case, * * upon the court's own theory, as stated, that 'the court of equity having jurisdiction of the cause should settle all matters involved.'" In view of Noble's position taken in the circuit court as to this provision in the decree, the error which he now assigns thereon need not be further considered.

It is further contended that the court erred in refusing to require O'Brien to account for the so-called "trust fund" of $2,521.56, in O'Brien's hands and received by O'Brien during the protracted litigation of the Schrage case (an "O'Brien" case in which Noble rendered services), and in not allowing Noble one-quarter of said sum, or $630.39, and also one-quarter of the accumulations thereon, as fees. No useful purpose will be served in detailing the opposing contentions regarding this fund and the facts concerning it. Suffice it to say that on the original hearing before the master Noble contended in substance that the fund should be treated as fees received by O'Brien and that he (Noble) should be allowed his share. The master disagreed with the contention and found that "it was no part of the fees received by O'Brien" and that "this fund is not properly an issue." The circuit court, in the former decree, in effect confirmed these findings of the master, and Noble, in the writ of error case, assigned cross-errors on the decision of the circuit court in this particular and made a lengthy argument in support of

his position, which were considered by us, though the point was not discussed in our former opinion. By our affirmance of the former decree, except in the four particulars mentioned, the point was in effect decided by us adversely to Nettle, and in his petition to the Supreme Court for a writ of certiorari he again urged the point, and by the denial of that petition the point must be considered as having been finally adjudicated and is not now open for re-consideration. (Union National Bank v. Rines, 187 Ill. 109; City of Chicago v. Dempsey, 251 Ill. 257, 258.)

Other minor points are urged as grounds for reversal or modification of the decree of October 24, 1925. We have considered all of them and believe them to be lacking in substantial merit. Accordingly, the decree will be affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

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ROBERT L. LEFFINGWELL,
and F. E. LEFFINGWELL,
copartners,
Appellees,

vs.

ORLANDO NOBLE, CHARLES M.
THUMM and WILLIAM F. THUMM,
Appellants.

235 I.A. 608

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit, commenced in the Municipal Court of Chicago on January 11, 1922, to recover commissions as real estate brokers, the court found the issues in favor of plaintiffs, assessed their damages at the sum of $2,220, and on December 3, 1923, entered judgment against defendants on the finding. This appeal followed.

In plaintiffs' amended statement of claim it is stated that their claim is for procuring a tenant for certain real estate and the building erected thereon in the City of Evanston; that the total amount of commission claimed is $2,220, viz: 3% of the value of the land, $570, and 3% of the cost of the building, $1650; and that said total amount is the usual and reasonable commissions for the services rendered.

In defendants' amended affidavit of merits (sworn to by the defendant, Noble) it is alleged in substance that defendants executed a lease to the Yellow Cab Company covering certain real estate in Evanston, and pursuant to the terms of the lease erected a building on the land; that the customary commissions for such a transaction would be approximately $2,220; that "defendants are liable to pay said commission to the broker who was the efficient and procuring cause of said lease being made and who in fact procured the Yellow Cab Company as a tenant to

execute said lease;" that one Arthur S. Carruthers, trading as A. S. Carruthers & Co., claims to be the broker who was the procuring cause of the transaction and to be entitled to said commissions and has commenced suit in this Municipal Court against these defendants for said commissions; that defendants made no special contract in respect to the payment of commissions with either Carruthers or plaintiffs, and are not bound to pay more than one commission; and that they are unable to determine between the conflicting claims to whom to make payment.

It thus appears that the issue made by the pleadings was whether or not plaintiffs were the procuring cause of the transaction. It also appears from the record that the two suits (the Carruthers suit and the present Leffingwell suit) were tried separately and without a jury before the same judge of the Municipal Court; that the Leffingwell suit was tried first; and that at the close of the evidence the judge stated that he would not decide the issues until he had heard the evidence in the Carruthers suit. While the record does not disclose the outcome of the Carruthers suit, yet counsel for defendants in their printed argument here filed say that "the court awarded Carruthers judgment for $750."

The following facts in substance were disclosed upon the trial: During May, 1921, one Hunter, local manager of the Yellow Cab Company at Evanston, called at plaintiffs' real estate office and informed Robert L. Leffingwell that the cab company desired to procure property in Evanston upon which to erect a garage. Leffingwell showed Hunter two or three pieces of property which were not satisfactory. In June Leffingwell showed other pieces of property to Hunter, among them the piece which was finally leased to the cab company and upon which a garage was erected. Hunter told Leffingwell that his authority was limited to finding a suitable location, and, if found, negotiations would have to be taken up with the general office of the cab company in Chicago.

He gave Leffingwell his card, on the back of which was written "C. W. Gray, general manager, 57 East 21st Street," and told him to see either Gray or Thomas Hogan. In July Leffingwell had an interview with Noble upon the latter's return from California and informed him of the negotiations with Hunter. Noble expressed a willingness to build a garage on the property and to make a lease to the cab company upon certain terms. Leffingwell telephoned the general office of the cab company in Chicago, talked with Hogan over the wire and informed him of Noble's attitude, and Hogan requested Leffingwell to submit a proposition in writing. Complying with the request Leffingwell, on July 7, 1921, wrote a letter to the cab company in Chicago, for the "attention of Mr. Thos. Hogan." The letter was duly received and is as follows: "To verify our conversation by phone * * I have a client that is the owner of 486 feet of ground on Chicago Avenue, in Evanston, just north of Keeney St., that will build for you (on a twenty year lease) a garage of whatever size you wish, from 100 by 170 feet or more (to your plans.) This property is owned by Orlando Noble. If you will make an appointment with me I will be pleased to call on you and get your ideas. The price to be approximately 50 cents per square feet space, of course depending entirely on what you want." About July 10th, one Nedin, a broker employed by Carruthers and who testified he represented the cab company, called on Noble regarding the same piece of property. Noble informed Nedin that the property had already been submitted to the cab company by Leffingwell, that he(Noble) did not intend to pay two commissions, and that he (Nedin) "had better get the status of the thing with the Yellow Cab Company." About July 14th Noble called on Leffingwell and informed him of the interview he (Noble) had had with Nedin, and Leffingwell said that, as he had submitted the property to the cab company first, he

(Leffingwell) considered that he would be entitled to commissions if the deal should be consummated. Nedin continued his negotiations with Noble and about July 30th informed Noble that the cab company claimed that Leffingwell had not submitted the property to it. Noble immediately called on Leffingwell and informed him of what Nedin had said, whereupon Leffingwell showed Noble a copy of the letter he had written to the cab company on July 7th. Thereafter Noble had further negotiations with Nedin and other representatives of the cab company, with the result that on September 28th, 1921, Noble and his co-defendants executed a 30 year lease of the property, commencing November 1, 1921, to the cab company. It was provided therein that the lessors would erect upon the land a one-story garage, according to certain plans and specifications mentioned, to be completed by November 1, 1921, and that if the building was not completed by January 1, 1922, the lessee had the option of declaring the lease at an end. It was admitted on the trial by counsel for defendants that they owed a commission on the transaction either to plaintiffs or to Carruthers.

The main contention of counsel for defendants is that the finding is against the evidence and that the judgment is against the law. The facts are somewhat similar to those in the case of Nigdon v. Nore, 226 Ill. 382, 387, in which it was decided in substance that, where a real-estate broker who begins negotiations for the sale of a building for his principal, which are carried on to a final sale, such broker cannot be deprived of his right to commissions because the principal takes up and completes the negotiations himself or through another party. (See, also, Shambers v. Farnham, 236 Fed. Rep. 836, 839; Friedland v. Isenstein, 191 Ill. App. 109, 113; Fridmore v. Nilson, 188 Ill. App. 343, 346.) It appears that Leffingwell, with Noble's authority, submitted to the cab company a written proposition for

the erection of a garage upon the property and the leasing of it as so improved to the cab company for a period of 30 years; that the cab company regarded the proposition favorably; that thereafter Carruthers (through his representative, Medin) commenced negotiations direct with Noble, at the commencement of which Noble informed Medin that the proposed lease, etc. had already been submitted to the cab company by Leffingwell; that plaintiffs did not cease or abandon negotiations and informed Noble that they expected commissions if the deal was consummated; that Noble subsequently completed the negotiations himself; and that finally the transaction was consummated by the making of a 30 year lease of the property, improved with a garage thereon, substantially as originally proposed. In view of all the facts and circumstances in evidence, and of the authorities cited, we are unable to say that the finding is against the evidence, or that the judgment is against the law. And we do not think that the court committed any error, prejudicial to defendants, in its rulings upon the admission of evidence.

The judgment of the Municipal Court should be affirmed and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

404/a

112 - 29200

235 I.A. 608

LEE R. McCULLOUGH,
Appellee,

vs.

WILCOX-WYMAN-O'ROURKE CO.,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $842.83, rendered against it by the Municipal Court of Chicago on January 14, 1924, after a finding in plaintiff's favor in said sum, but which was entered without the court hearing any evidence.

Plaintiff alleges in his statement of claim that during September and the early part of October, 1923, he was engaged in selling for defendant certain hardware and other articles manufactured by it, and that on October 9, 1923, he made a written proposition to defendant, as follows:

> "I will act as Sales Manager for your Company, to have charge of sales of all products, manufactured by your Company, including plating and enamelling. As compensation for said services, I agree to accept in full for my services Ten per cent (10%) of all sales made by your Company, except sales of ash trays. * * * As a part of my services as Sales Manager, I agree to employ at my expense such additional salesmen as may be necessary; to pay for said salesmen; to pay the cost of necessary advertising in connection therewith; incidental expenses incurred on account of said sales. This proposition to be in force from October 1, 1923, to December 1, 1923."

Plaintiff further alleges that the proposition was duly accepted by defendant; that thereafter he devoted practically all his time to the securing of orders for it and did a great deal of "missionary work" for its benefit; that he caused certain advertising to be done and employed the

services of certain salesmen and a stenographer and paid for said advertising and said services; that thereafter large orders for hardware, plating and enamelling were secured for defendant which it accepted; that on November 6, 1923, he was wrongfully discharged; that certain orders (itemized as to name and amount), aggregating $7828.50, were received and accepted by defendant, and on these orders plaintiff is entitled to receive a commission of ten per cent, or $782.83; that in addition to receiving said orders defendant, prior to the date of plaintiff's discharge, did at least $600 worth of plating, upon which plaintiff is entitled also to $60; and that by reason of his wrongful discharge he has sustained damages, in that he has been deprived of earning certain commissions, amounting to $159.17.

In defendant's amended affidavit of merits, by its president, it admits the acceptance on October 9, 1923, of plaintiff's proposition, but it denies that it owes him any moneys or that he has suffered any damages. It alleges in substance that under the terms of the contract it became his duty, as sales manager, to have taken charge of the sales of all products manufactured by defendant after October 9, 1923, to have employed additional salesmen at his own expense, to have himself paid the cost of the necessary advertising in connection with sales and other incidental expenses incurred on account thereof, and to have devoted the proper amount of time to the management of the sales department of defendant's business; that on the contrary he did not keep and perform his part of said contract in that he did not, as defendant's sales manager on or after October 9, 1923, take charge of its sales, and did not employ additional salesmen at his own expense or otherwise, and did not himself pay the cost of the necessary advertising and

other incidental expenses incurred on account of sales, and did not devote the proper amount of time to the management of defendant's sales; that he was not wrongfully discharged on November 6, 1923; that such discharge was made because he failed and refused to perform his duties as sales manager, but transacted an insurance business of his own in defendant's offices against its wishes, and devoted his time to such insurance business and not to defendant's business; that from October 9, 1923, and prior to December 1, 1923, defendant received certain orders for its products, including orders for plating and enamelling, but such orders were not the result of plaintiff's services; that during September and prior to October 9, 1923, plaintiff, under a verbal agreement with defendant, solicited and obtained certain orders for defendant, upon which he was entitled to about $420 in commissions; and that for these orders he drew out of defendant's treasury about $500, resulting in his being overpaid to the extent of about $80.

The bill of exceptions discloses that on the trial plaintiff only claimed the first two items mentioned in his statement of claim, aggregating $842.83; that the court ruled, in view of the allegations of defendant's affidavit of merits, that plaintiff need not put in any evidence and that the burden was upon defendant to prove its defense as therein stated; that thereupon defendant's attorney stated that it was incumbent upon plaintiff to first prove his case as alleged, and he refused to then introduce any evidence on defendant's behalf; and that thereupon the court without plaintiff introducing any evidence whatever, found the issues for him and assessed his damages at said sum of $842.83, and entered the judgment in question.

We are of the opinion that the trial court erred in making the finding and entering the judgment. "The general rule is that the burden of proof rests upon the one who substantially asserts the affirmative of the issue, - that is, upon

the party who would be defeated if no evidence at all were offered." (Abbey v. Granzin, 262 Ill. 636, 638; 1 Greenl. on Ev., 16th Ed., Sec. 74.) We think that under the pleadings it was incumbent upon plaintiff, as a part of his prima facie case, to prove that he complied with his contract in acting as sales manager for defendant until the time of his discharge, in employing some additional salesmen at his own expense, and in himself paying for advertising and the incidental expenses incurred on account of sales, and that orders, as alleged in his statement of claim, were received and accepted by defendant.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

4042

118 - 29206

235 I.A. 608

JULIUS AUERBACH,
Appellant,

vs.

NANNIE J. AUERBACH,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Complainant appeals from an order of the Superior Court of Cook County, entered November 9, 1923, allowing his wife, Nannie J. Auerbach, $250 per month for temporary alimony and $350 for solicitor's fees.

Complainant filed his bill for divorce on the ground of her alleged extreme and repeated cruelty. She filed an answer denying the charges and also a cross-bill praying for a separate maintenance. Shortly thereafter, on November 7, 1923, she filed a petition praying for alimony and solicitor's fees, in which she alleged that complainant was the owner of considerable property and had an annual income from his practice as a physician and surgeon of about $20,000. She also filed, in support of the petition, her own affidavit and the affidavits of three other persons. These affidavits were read upon the hearing of her motion for alimony and solicitor's fees. They tended to show that complainant had an income of over $1000 per month from the practice of his profession, and was the owner of considerable property. It so happened that, upon said hearing, defendant and said three other persons were present, and, upon objection being made by complainant's counsel to the filing of the affidavits, the court had said persons sworn and they were examined in open court by complainant's counsel and they testified to substantially

the same facts as stated in the affidavits. On the hearing, also, complainant testified as to the amount of his annual income, and four other witnesses were called by him and they testified.

The main contention of complainant's counsel is that the amount per month allowed for temporary alimony and the amount allowed for solicitor's fees are excessive. No useful purpose will be served in detailing the testimony adduced upon the hearing. Suffice it to say we think that upon that testimony the chancellor was amply justified in making the allowances he did. They were largely in his discretion (Foss v. Foss, 100 Ill. 576, 579; Harding v. Harding, 144 Ill. 588, 598; Klekamp v. Klekamp, 275 Ill. 98, 107); and that discretion, in our opinion, was not abused. (Umlauf v. Umlauf, 22 Ill. App. 560, 563.) The allowance for alimony is but temporary and is subject to modification at any time to meet any new or unforeseen circumstances. (Foss v. Foss, 100 Ill. 576, 581.)

Accordingly the order of the Superior Court will be affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

404a

124 - 29213

SOPHIA A. HANSEN, executrix etc., estate of Carl Hansen, deceased,
Appellee,

vs.

THE AUTO EXCHANGE, a corporation,
Appellant.

235 I.A. 608

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The defendant seeks by this appeal to reverse a judgment for $450 rendered against it by the Municipal Court of Chicago after a finding in plaintiff's favor in a fourth class action in contract.

Plaintiff, in her statement of claim, alleged that in April, 1922, the deceased, Carl Hansen, in his lifetime, delivered to defendant a Haynes automobile to be sold by it for him; that it thereafter sold the automobile for the sum of $1150, but accounted only for $700; and that there was due from defendant to said Hansen at the time of his death the sum of $450.

On the trial plaintiff called Lewis E. Bower, president of defendant, under section 33 of the Municipal Court Act, and examined him, and also introduced two papers, both signed by defendant, per A. H. Bower, and by Hansen. He identified the signature of A. H. Bower to the papers, who, he said, was defendant's salesman. He further testified that after Hansen had left the Haynes car with defendant it was sold by defendant for $1150, and that the difference between this amount and the credit allowed to Hansen ($700) had never been paid either to Hansen in his lifetime or to plaintiff. The two papers are, in part, as follows:

(Plaintiff's Exhibit 1)

"Consignment Agreement

Chicago, Ill. April 13, 1922.

Received of Carl Hansen one Haynes * * No. 41977 A, Motor Automobile, * * to be sold for his account. The amount therefor remitted to him when sold to be submitted to Mr. Hansen. * * It is agreed that said machine shall remain on sale not less than 7 days, and that a storage charge of _____ dollars a month shall be charged thereon from the above date until sold or withdrawn. It is also agreed and understood we are not responsible for said machine in case of fire or theft, or any other damage beyond our control. We reserve the right of demonstrating said machine.

(Signed) THE AUTO EXCHANGE
By A. H. Bower

I accept the above contract.
(Signed) Carl Hansen"

(Plaintiff's Exhibit 2)

"THE AUTO EXCHANGE

THE HOUSE OF REAL BARGAINS.

Chicago April 15, 1922.

Sold to C. Hansen

1 Peerless Tour. (New) Serial 271714, Motor 21949	$2500
By credit on Haynes, left for sale,	700
	1800
Bal.	1800
By check, 4/15/22,	

One Haynes 5 Pass. Touring, Serial 41977 A, to be left with Auto Exchange for a period of thirty days from this date for sale. No charge will be made for sale. If car not sold within thirty days C. Hansen to redeem for the sum of $700. We guarantee the Peerless car for 90 days from this date against mechanical defects.

(Signed) The Auto Exchange
by A. H. Bower

The above car is accepted as shown and the Auto Exchange reserves the right to resell car if purchaser does not fulfill agreement as to redeeming balance of purchase price after the deposit has been made. No verbal promises or agreements accepted unless specified in this order.

(Signed) Accepted
Carl Hansen"

Both papers are on printed forms - the blanks being filled in with pencil handwriting. In "Exhibit 1" the printed words, after the written words on the 4th line "to be submitted to Mr. Hansen," in the blank were: "or best cash offer, less repairs, parts, labor or other charges such as painting, top repairs, curtains, batteries, slip-covers, re-nickeling and additional equipment." These words were erased by the drawing over them of a heavy pencil line, thus plainly indicating that no repairs on the Haynes car were authorized by Hansen to be made, and that if a sale was made by defendant no deductions were to be made from the price received for any repairs, etc., made by defendant.

On behalf of defendant said Lewis E. Bower was called as a witness and he testified, over plaintiff's objection, as to defendant making certain repairs on the Haynes car before defendant sold it, and as to the cost of the repairs. He also testified, over plaintiff's objection, to a certain conversation which he claimed to have had with Hansen, during Hansen's lifetime, in which, as he claimed, Hansen verbally agreed that certain repairs might be made to the Haynes car at Hansen's expense, and that he (Hansen) would pay defendant a 5 per cent commission for the sale of said car. This testimony, given after Hansen's death, as to a conversation had with Hansen, was clearly incompetent under section 2 of the Evidence Act, and was properly disregarded by the court in making the finding. It also was at variance with the terms of the written contracts between Hansen and defendant.

We are of the opinion that the finding is amply justified by the evidence. It sufficiently appears that the Haynes car was given to defendant in part payment, viz., $700, of the price charged for the Pearless car, and was to

be sold by defendant for Hansen's account, without any charge for making the sale, at a price, if possible, in excess of $700, and before being sold at any price the amount thereof was to be submitted to Hansen, so that he might decide whether to accept the price, or pay $700 and redeem the car. And according to the testimony of defendant's president the car was sold for $1150 and defendant never accounted for the excess over $700. We think that the judgment should be affirmed and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

404a

135 - 29222

HEDSTROM-SCHENCK COAL COMPANY, a corporation, Appellee,	235 I.A. 608
vs.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
WICKHAM & BURTON COAL COMPANY, Appellant.	

STATEMENT BY THE COURT. The Wickham & Burton Coal Company, defendant, prosecutes this appeal to reverse a judgment against it for $38,000, rendered after verdict by the Superior Court of Cook County in an action of assumpsit, commenced by plaintiff on June 2, 1921, to recover damages for the alleged failure of defendant to deliver certain coal according to the terms of a written contract executed by the parties on April 21, 1920. The contract is in part as follows:

"The Wickham & Burton Coal Company sells and Hedstrom-Schenck Coal Company buys the coal hereinafter mentioned under the terms and conditions specified.

Kind: From the White Ash Mine of the Johnston City Washed Coal Company. Seller has the right to substitute coal from any other Williamson or Franklin County Mine or from the Paradise mine at DuQuoin.

Grade: Lump, egg and nut. Seller to determine quantities of each.

Quantity: 75 cars per calendar month from April 1920 to March 1921, both included.

Price: For shipments made during the month of April, $3.10 per ton of 2,000 pounds. Each month after April the price will be increased ten cents per ton until it is $3.60. For shipments during the month of September and thereafter the price is $3.60 per ton. The price is based on the present wage scale and shall be increased or decreased as the wages of miners or company men are increased or decreased, or working hours or conditions affecting the cost of production are changed. In case of any change in the wage scale, working hours or conditions, the seller shall determine the extent to which such change affects the cost of production and shall promptly notify the buyer. Coal thereafter shipped shall be at the changed price. * *

Weights: The price is f.o.b. mine, which is the point of delivery. Mine weights to govern.

Payment: Buyer will on or before the 10th day of each month pay for all coal shipped during the preceding month. In case buyer fails to make such payment promptly, seller may at its option terminate the contract, or it may suspend shipments during the continuance of such default. In either event buyer shall remain liable for any damage sustained by seller by reason of the non-delivery of coal during the continuance of such default. And it is expressly agreed that should seller at any time fail to rescind because of default in prompt payment, its right to rescind for subsequent default shall not in any manner be affected by such prior leniency. Should seller become dissatisfied with buyer's credit seller may require payment on delivery of car numbers.

Destination: Coal is to be billed out as ordered by buyer, so far as railroad rules will permit. Shipments are to be spread as evenly over the month as seller's conditions will permit.

Condition: If the operation of said White Ash mine be interfered with by strike, accident, car shortage or other cause beyond seller's control, so that the capacity of said mine to produce the grades of coal specified is restricted, then the seller will be excused from non-delivery during the continuance of such disability to the extent that such disability restricts production. In case of such restricted production shipment of buyer's pro rata share of the coal produced, as determined by seller, shall be taken to be full performance during such period. That is to say, after the removal of such disability the seller shall not be obligated to make up any deficiency in prior shipments. Nor shall the seller be obliged under any circumstances to deliver coal from any mine other than the White Ash mine."

Plaintiff's original declaration consisted of two counts. In the first the contract is pleaded according to its legal effect. It is alleged that plaintiff bargained with defendant to buy, and defendant sold to plaintiff, "900 cars of bituminous coal" from said White Ash mine, at the price of $3.20 per ton for 75 cars to be delivered during the month of April, 1920, and at certain named prices for 75 cars to be delivered during each of the succeeding months until and including the month of August, "and the balance to said 900 cars" at the price of $3.60 per ton, "to be delivered by defendant to plaintiff, f.o.b. mine, at the rate of 75 cars per calendar month, and to be paid for by plaintiff to defendant on the delivery thereof on or before the 10th day of each month for all coal delivered during the preceding month;" that, in consideration of plaintiff's promise that it would receive and pay for the coal, defendant promised to deliver the coal; and that, "although the

said time for the delivery of the said coal has long since elapsed and plaintiff has always been ready and willing to accept and receive the said coal and to pay for the same at the prices aforesaid, yet the defendant did not nor would, within the time aforesaid or afterward, deliver the said coal" (except a stated number of cars), whereby plaintiff has been deprived of large gains and profits, etc. In the second count the contract is set forth in hæc verba, and in somewhat similar language a breach thereof by defendant, in failing to deliver all of the coal due by January, 1921, is alleged. After the verdict had been rendered and before judgment, plaintiff, by leave of court, filed an amended declaration, consisting of two counts similar respectively to the original counts, but with the addition in each that plaintiff "has received all cars of coal offered, tendered or delivered to it by defendant, and paid for the same, and has fully done and performed all of the things required of it under said contract."

To the original declaration defendant filed a plea of the general issue and four special pleas. In the second plea, after mentioning the provisions that plaintiff should receive and defendant should deliver certain quantities of coal each month during the period expiring March 31, 1921, defendant avers that plaintiff did not perform the contract on its part, in this, that after November 1, 1920, it "declined to receive the full quantity of coal deliverable during that time, and failed and refused to furnish to defendant shipping instructions for all of such coal," and that after January, 1921, it "declined to receive any part of the coal then deliverable and failed and refused to give shipping instructions for any part thereof." The third plea is substantially the same as the second plea. In the fourth plea, after setting forth some of the provisions of the contract in the clause headed "Condition," defendant avers that at various times during the year 1920, the operation of the mine was interfered with by

strike, accident and car shortage, whereby the mine's capacity to produce coal was greatly restricted; that during such time it had other contracts for the delivery of coal to be mined during the same period covered by plaintiff's contract, which contracts, including plaintiff's, were not in the aggregate for more coal than defendant expected the mine could produce; and that during such period it shipped to plaintiff its pro rata share of the coal produced until January 1, 1921, when and thereafter plaintiff refused to receive any more of the coal and failed to give shipping instructions. The fifth plea is a plea of set-off for damages. Replications to the pleas and some rejoinders were filed.

Plaintiff, a coal broker, handled anthracite and bituminous coal in wholesale lots, and maintained its principal office and retail coal yards in Chicago. Defendant, also a coal broker, was the sales agent of the White Ash mine, located near Johnston City, Illinois, and also of the Paradise mine at Du Quoin, Illinois. These mines produced bituminous coal. The coal mentioned in the contract was purchased by plaintiff for the purpose of reselling it to its customers in Chicago and elsewhere. While negotiations were in progress as to the contract several orders for coal were given by plaintiff and written acceptances signed by defendant to apply on the contract. Commencing on April 9, 1920, and thereafter up to January 20, 1921, plaintiff gave orders, designating the grade of coal, number of cars and destination. All coal desired in Chicago was ordered shipped to plaintiff at Chicago, and for convenience, may be referred to as "for shipment to plaintiff." All coal desired for plaintiff's customers at other points were ordered shipped to those customers - they being designated as consignees - and may be referred to as "for shipment to customers." There is no dispute as to the giving of subsequent orders, or of acceptances therefor, except for an order given

in April for 75 cars for shipment to plaintiff, and one given in December for one car for shipment to a customer of plaintiff. Defendant did not accept either of these two orders, and it claims it did not receive them, and contends that there is no legal evidence that they were mailed to it. During April undisputed orders were given by plaintiff and accepted by defendant for 53 cars, of which 43 were for shipment to customers and 10 for shipment to plaintiff. There were actually shipped during that month seven cars. During May plaintiff gave orders for 76 cars - one for shipment to a customer and 75 for shipment to plaintiff - and during that month there were shipped eight cars. During the months of June and July no orders were given by plaintiff, but during June there were shipped thirteen cars, and during July eight cars. At the end of July defendant had shipped a total of 36 cars on undisputed orders for 129 cars, leaving a balance of 93 cars unshipped. About June 10th, as the result of conversations between representatives of the respective parties, an arrangement was made whereby mine-run coal was substituted temporarily for "prepared" coal (i.e. screened coal - lump, egg or nut, mentioned in the contract) and thereafter no prepared coal (except two cars on June 26th) was shipped until sometime in December. Naturally, no mine-run coal could be shipped to plaintiff's customers on unfilled orders for prepared coal then on file with defendant.

On August 3rd, plaintiff sent the following order (No. 909) to defendant: "Please ship * * seventy-five <u>or more</u> cars, Carterville mine-run, lump, egg or nut, to cost us contract price per net ton, f.o.b. cars at mine. Ship to Nedstrom-Schenck Coal Co., 35th & Iron Streets, Chicago. * * These shipping instructions apply on contract." Accompanying this order was the following letter:

"We extremely regret to note that we have not received any shipments on our contract for sometime past although you have had shipping instructions on mine-run and the prepared sizes. Of course, we realize that the last few days the mines have been out on strike, but see no reason why we should not have received shipments during the period during which you were loading coal. As soon as you resume operations, may we ask you to see that our contract tonnage is loaded for us, applying such shipments on the order we are sending you herewith for shipment to our 35th and Iron Streets docks."

On the trial the court instructed the jury that the effect of the foregoing letter and order was "a suspension of all previous orders theretofore given by plaintiff to defendant under said contract and at that time unfilled, and defendant was not thereafter obliged to fill such previous orders without further directions from plaintiff." No further directions to ship, under previous orders unfilled on August 3rd, were given until late in December.

On August 27th, defendant wrote plaintiff: "The Illinois Operators signed a new agreement with the miners yesterday granting them an increase, which will, of course, increase the cost of mining; this agreement was made effective August 16th; any coal shipped since that date is subject to this increase; * * we estimate at the present time that this increase will be approximately 30 cents per ton." During September and thereafter all coal shipped to plaintiff was billed at $3.90 per ton instead of $3.60, and paid for at that price.

In addition to the order of August 3rd, for "seventy-five or more" cars, plaintiff during August ordered 26 cars for shipment to customers. Defendant shipped during that month 14. During September plaintiff ordered ten cars, but defendant shipped 13. During October plaintiff did not order any cars, but defendant shipped 16. During November plaintiff ordered 21 cars, and the same number were shipped. From August 1st to December 6th (treating plaintiff's order, No. 909, as an order for 75

cars) plaintiff ordered a total of 124 cars, and defendant shipped 66 cars, leaving a balance of 58 unshipped cars for that period. Plaintiff's counsel contended on the trial, and here contend, that the effect of plaintiff's letter of August 3rd, and accompanying order, was to give to defendant instructions to ship not less than 75 cars per month thereafter to plaintiff's designated coal yard in Chicago, and that further shipping instructions in September and thereafter were unnecessary.

On December 6th plaintiff refused to receive any more mine-run coal and thereafter no such coal was shipped under the contract. On that day plaintiff wrote defendant:

> "Unless conditions permit, it will be absolutely impossible for us to accept Mine Run. You have on file orders from us on prepared coal which is covered by our contract, and we must insist that you furnish us with screened lump, egg or nut to enable us to fulfill our obligations."

On December 15th, plaintiff wrote defendant:

> "In going over our records, we find we have furnished you with shipping instructions applying on our contract covering shipment of lump, egg and nut to various customers. They are now insisting upon us completing these orders with as little delay as possible, and, such being the case, we write to ask just what we can depend upon from you."

MacDonald, defendant's representative, testified that a day or two after the receipt of this letter he had a conversation with Lane, plaintiff's representative, informing him that defendant could ship lump, egg or nut coal from the Paradise mine (mentioned in the contract); that "Lane said he would * * give us disposition as fast as possible on this coal, but at that particular moment he was not in a position to furnish us any definite orders;" and that after this conversation defendant shipped to plaintiff lump, egg and nut coal to some extent from the Paradise mine. Lane testified that, while he remembered having a conversation with MacDonald shortly after December 15th, he did not remember its purport. Yet the evidence discloses that

in some subsequent orders for prepared coal plaintiff specified coal from the Paradise mine, which it had not done before December 15th.

On December 20th, plaintiff wrote defendant:

> "Will you kindly discontinue any further shipments of Paradise or White Ash prepared coal to our order, Chicago, as we will furnish you with other disposition later."

Apparently, no such later instructions were given, but in December plaintiff gave new orders for six cars - five for shipment to customers (defendant claims an order for one of these cars was not received) and one car for shipment to plaintiff, and in January, 1921, new orders for four cars for shipment to customers. All of these orders were filled, except as to the one disputed order. No orders were given after January 20th, and defendant's last shipment to plaintiff was made on January 26th. MacDonald further testified that in January and February he frequently asked plaintiff, through Lane, for shipping instructions. Lane further testified that in February, MacDonald told him that defendant was not going to ask plaintiff to take any more coal. Evidence was introduced on defendant's behalf tending to show that during the months of December to March, inclusive, it was able and willing to ship prepared coal from the Paradise mine to plaintiff, and during the months of January to March, inclusive, it was able and willing to make shipments to plaintiff from the White Ash mine.

After the contract was signed the market price of bituminous coal steadily advanced until about November, when a break came, which was followed by a noticeable slump in prices during December, so that during that month and the first three months of the year 1921 the contract, as to price, was not advantageous to plaintiff. The White Ash mine was supplied with cars by the Chicago & Eastern Illinois (hereinafter referred to

as the C. & E. I.) and the Missouri Pacific Railroads. The capacity of a coal car is about 50 tons. The mine had a capacity of about 2,300 tons per day, or about 46 cars. From April to November, inclusive, there was a constant shortage of cars, and in July and August there was a strike of the miners restricting the production of the mine. Defendant introduced in evidence about ten contracts made by it with firms and corporations other than plaintiff for the sale of coal from the mine. All of these contracts were for a period of one year ending March 31, 1921, and, including plaintiff's, were intended to cover the expected output of the mine for the year, and the amount of coal sold by all of them did not exceed the capacity of the mine. Among these contracts was one between the owner of the mine and the C. & E. I. Railroad, covering "a minimum of 300 tons, and a maximum of 550 tons, of mine-run coal * * each day the mine works," the railroad "to furnish cars to receive the coal at a price of $2.85 per ton based on then existing wage rates," and the cars so furnished "shall not be counted against the seller in the distribution of cars for commercial loading." If the C. & E. I. Railroad took the maximum, on each day the mine worked, this would amount to 11 cars each day. Records disclosed that the White Ash mine worked during the contract year, ending March 31, 1921, 255 days, which entitled the railroad to 2,585 cars as a maximum, but it was also shown that the railroad received during that period 5,051 cars, or 2,466 more than the maximum. It was also shown that the total number of cars shipped from the mine during said period was 7,904, of which 6,951 cars were shipped over the C. & E. I. Railroad, and 953 cars over the Missouri Pacific Railroad; and that of the 6,951 cars shipped over the former only 1900 went to commercial customers, making the total number of cars received by all commercial customers 2,853, including those cars shipped over the Missouri Pacific

Railroad. Of these 2,853 cars plaintiff admitted receiving 132 cars, leaving a balance of 2,721 cars received by all commercial customers other than plaintiff. On the trial plaintiff was permitted over defendant's objection to show by the testimony of Fred A. Burton, president of defendant, on cross-examination, and by other evidence, that these 2,721 cars did not all go to such of defendant's customers as it had made yearly contracts with, but that about 2,000 cars were sold and delivered to customers other than those who had said yearly contracts, and at then existing market prices, which were greatly in excess of plaintiff's contract price, whereby, as plaintiff's counsel argued to the jury, defendant made "piratical" profits at plaintiff's expense, and whereby it appeared, as counsel further argued, that defendant's defense, as to strikes, car shortage and pro rata deliveries prior to January 1, 1921, was not made in good faith.

On the trial defendant, in addition to its defense as to plaintiff's failure to give shipping instructions, and in connection with its defense as to car shortage and pro rata deliveries, made the further defense that, by reason of the action of the C. & N. I. Railroad in placing cars at the mine to be loaded solely for railroad purposes and in refusing to permit said cars to be loaded for shipment for defendant's commercial customers, such cars should not be considered as the output of the mine in computing plaintiff's pro rata share of the restricted production. In support of this further defense it called several witnesses, but their testimony was afterwards stricken out and the jury instructed to disregard the same. Among these witnesses was Edward J. Alexander, fuel agent of the C. & N. I. Railroad, who testified in substance that early in May, 1920, he notified defendant that the Railroad would place "bad order" cars at the mine to be loaded for coal for the Railroad, which cars could be used only for that purpose; that on days when there was a number of cars ready to be

loaded for commercial customers the Railroad would not take any coal for its own use, so as not to interfere with defendant's getting a proper proportion of cars for its customers; that thereafter about four o'clock each afternoon the witness ascertained if defendant would receive the next day sufficient cars for loading for customers to permit the mine to work, and if not, he would order "bad order" cars placed at the mine for coal for the Railroad; that in April and thereafter cars, other than bad order cars, sometimes were placed at the mine to be loaded with coal for the Railroad, and when this was done, inasmuch as there was a shortage of coal and it must have coal for its needs, the Railroad refused to accept any commercial billing for the cars, even though defendant was rightfully entitled to such cars for its commercial customers.

On the trial plaintiff's initial position was that under a proper construction of the contract, and particularly because of the clause: "The price is f.o.b. mine, which is the point of delivery," it was defendant's duty to act first, namely, to deliver or offer to deliver coal at the mine. Defendant, on the contrary, contended, and particularly because of the clause: "Coal is to be billed out as ordered by buyer, so far as railroad rules will permit," that the first requirement as to performance devolved upon the plaintiff, namely, to give shipping instructions for the coal desired under the contract, and that until plaintiff gave such instructions defendant neither could nor was required to do anything. Early in the trial the court ruled, in substance, that, while the burden might not be upon plaintiff to show the giving of shipping instructions in performance of the contract on its part, yet it could only recover damages for non-delivery as to those cars for which shipping instructions had been given; and further ruled that shipping instructions once given were good until filled or can-

called, and that it was not necessary to give new instructions each month. Thereupon plaintiff, finding the trial court opposed to its construction of the contract but that the rulings gave opportunity for the possible recovery of damages, proceeded to make proof of the giving of shipping instructions, and of damages for non-delivery of cars up to December 31, 1920, to the extent of the unfilled shipping instructions theretofore given. In their printed brief and argument here filed plaintiff's counsel state that this action was taken, not for the purpose of proving performance of plaintiff's obligation to give shipping instructions, but to meet the trial court's view of the contract, and that no abandonment was intended of plaintiff's initial position. Four witnesses called by plaintiff testified as to the market price of bituminous coal during each of the months of the year ending March 31, 1921, stating prices considerably in excess of the contract prices for each of the months up to and including December, 1920, but also showing that in January, 1921, and the two succeeding months, the market price were less than the contract price. Two witnesses for defendant testified as to the market prices during each month of the contract year, and the prices as given by these were considerably less than those given by plaintiff's witnesses. After all the evidence had been heard and the case was being argued to the jury, plaintiff's attorney, having made many computations from the evidence and having prepared five so-called "tables," A to E, presented to the jury, orally and not in written statement form, the result of his computations and the purport of the tables, which are all set forth in the brief and argument here filed in plaintiff's behalf.

Table "A" purports to show the number of cars ordered by plaintiff during the months from April to December, inclusive, and those actually shipped. No account is taken of orders can-

called or withheld. The table, or rather a supplement thereto, discloses the unfilled orders (undisputed) to amount to 181 cars, and this upon the theory that said order of August 3rd was an order for 75 cars only. Table "B", purports to show the differences each month during the contract year between the market price of coal (arrived at by taking the average of prices as stated by plaintiff's witnesses) and the contract price. Plaintiff's counsel then state that further computations were made (according to their theory), and the results presented to the jury, as shown in Table "C", which take into account the evidence as to strike, broken machinery and car shortage at the mine, and of the probable proportion of cars each month to which plaintiff was entitled, under the contract, because of these interferences. In Table "C" it appears that plaintiff, for the month of April, 1920, was entitled to 42 cars instead of 75 cars, for May 49, for June 56, for July 53, for August 49, for September 55, for October 58, for November 54, for December 41, or a total of 457 cars for the nine months ending with December, 1920. And counsel further state that, as the average number of tons of coal contained in a coal car was shown by the evidence, and as the total number of cars actually shipped to plaintiff (132) was undisputed, he proceeded to make further computations, as set forth in Table "D", wherein is shown in one column each month's "shortage in cars shipped," and in another column each month's "shortage in tons." It appears that the results shown in the one column were obtained by subtracting from the number of cars to which plaintiff was entitled in any particular month (as shown in Table "C") the number of cars which were actually received by plaintiff during that month, as shown by the evidence and as set forth in Table "A". But, Tables "C" and "D" are made up without regard to the number of cars for which plaintiff gave shipping directions, and without regard to what the evidence disclosed concerning the cancellation of orders or

plaintiff's directions to withhold shipments. In Table "D", from April to December, inclusive, the number of cars actually shipped to plaintiff during that period totals 181. While the shipment in January, 1921, to plaintiff of 11 cars is shown in the table, no credit is apparently allowed to defendant for these cars in figuring the "shortage in cars" and the "shortage in tons" for each month to and including December, 1920. The total number of cars "short," ending December, 1920, not including the 11 cars shipped in January, 1921, is 336.

And counsel further state that from the above tables he made further and final computations, as set forth in Table "E", wherein plaintiff's damages are shown for each month from April to November, 1920, inclusive, and for 2/3rds of the month of December (December 20th). Each of these monthly damages is shown by the table to have been obtained by multiplying each month's "shortage in tons," as disclosed by table "D", by the excess of market price of coal per ton over the contract price, according to the testimony of plaintiff's witnesses and as shown in Table "B". The total damages to plaintiff to December 20, 1920 is shown by Table "E" to be $39,670.08. And counsel further state that these are the total damages to which, as he argued to the jury, plaintiff is entitled to, "after allowing to defendant the benefit of all interferences which the evidence might indicate." From the amount of the jury's verdict for plaintiff in the sum of $38,000, returned on February 7, 1923, it is apparent that the argument of plaintiff's counsel relative to damages was favorably received by the jury. Judgment on the verdict was not entered until October 27, 1923, and plaintiff's counsel have assigned as a cross error, among others, the refusal of the court to include in the judgment interest on the verdict, amounting to $1,362.40, from the date of its rendition to the date of judgment.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT:

Among the errors assigned by defendant's counsel for a reversal of the judgment are (1) that the verdict is against the law and the evidence, and (2) that the damages awarded are grossly excessive. Their main point is that under the contract plaintiff was obligated, as a condition precedent to any act of performance by defendant, to give orders to defendant to bill out the coal, and that plaintiff's failure to give such orders constituted a breach of the contract upon its part.

The contract provided that defendant sells and plaintiff buys, at certain stipulated prices, 75 cars per calendar month from April, 1920 to March, 1921, both included, of lump, egg and nut coal from the White Ash mine, unless restricted production at the mine reduced the number of cars. The seller (defendant) had the right or option of substituting coal from certain other mines, including the Paradise mine at Dunsmuir, and it was expressly provided that the seller should not be obliged to deliver coal from any mine other than the White Ash mine. The contract further provided that "the price is f.o.b. mine, which is the point of delivery," and that the "coal is to be billed out as ordered by the buyer (plaintiff) so far as railroad rules will permit." Plaintiff claims damages for defendant's alleged failure to deliver some of the coal. The evidence discloses in substance that from April 9, 1920, to January 20, 1921, plaintiff from time to time gave orders and shipping directions for only 338 cars (treating the order of August 3rd for "75 or more cars" as an order for 75 cars, and counting the two disputed orders, aggregating 76 cars, as having been given); that during each of the months from April to January, inclusive, plaintiff received and paid for 133 cars; that it did not follow a practice of ordering 75 cars per month; that during

the earlier months of the contract year, when the market prices were higher than the contract prices, it accepted all shipments, frequently complained of insufficient deliveries and made demands for more; that on December 6th, after the market price of coal had greatly declined and was continuing to decline, it objected to receiving any more mine-run coal, but consented to receive, and did order and receive, certain cars of prepared coal from the Paradise mine; that of about 41 cars of prepared coal covered by prior orders for shipment to customers, and which had not been shipped before December 10th, it thereafter gave shipping directions for only three cars (which defendant shipped), ordered 11 cars held for further directions (which were not given) cancelled prior orders for 12 cars, and gave no instructions for the remaining cars; and that on December 20th it gave instructions in writing to defendant to "discontinue any further shipments of Paradise or White Ash prepared coal to our order, Chicago," and to wait for later shipping directions, which were not thereafter given. It therefore appears that at this time (December 20th) defendant did not have on file any orders with definite shipping instructions, which had not been filled or cancelled. The evidence further discloses that thereafter in December and in January plaintiff gave new orders for 10 cars, all of which defendant shipped except one car, the order for which was disputed; that from and after January 20th, more than two months before the end of the contract year, plaintiff did not order any cars; and that during January, February and March, defendant was ready, able and willing to make shipments under the contract from the White Ash mine. Whatever breaches of the contract defendant may have committed prior to December, in failing to fill certain orders, plaintiff, because of these breaches, did not elect to rescind or cancel the contract, but elected to keep it alive for the benefit of both parties by thereafter giving further orders for coal in December and January,

which defendant filled. (Lake Shore etc. Ry. Co. v. Richards, 152 Ill. 59, 80; Kadish v. Young, 108 Ill. 170, 183; Chicago Washed Coal Co. v. Whitsett, 278 Ill. 623, 627.) And, this being so, plaintiff, in an action on the contract for damages because of defendant's alleged failure to deliver coal according to the contract prior to December, 1920, was required, before it could recover such damages, to allege and prove performance of the contract on its part, or a legal excuse for non-performance. (Lake Shore, etc. Ry. Co. v. Richards, supra; Chicago Washed Coal Co. v. Whitsett, supra.) The evidence further discloses that where coal was intended for shipment from the mine to a customer of plaintiff at a distant point it was necessary for defendant to be fully informed as to the destination, etc., so that the coal could be properly billed and shipped; that the White Ash mine loaded its coal directly from the mine into cars supplied by two railroads, and was required by the railroads to furnish billing (i. e. consignee, destination and route) on the same day the cars were loaded and taken from the mine; that if such billing was not then given the cars were held by the railroad as "unbilled" and charged against the mine as cars furnished each day until the billing was given; that the effect of not billing the cars on the day they were loaded would be to reduce the actual number of cars furnished the mine each day and thereby restrict its production until the unbilled, though loaded, cars were billed; and that all orders which plaintiff gave to defendant under the contract were accompanied with definite shipping directions.

Under the provisions of the contract, and particularly the clause that the "coal is to be billed out as ordered by the buyer so far as railroad rules will permit," and considering the situation of the parties and their respective businesses, and the evidence in the present record, we are of the opinion that the first step towards performance of the contract in question was re-

quired to be taken by plaintiff, namely, by giving orders and shipping instructions for the billing out and shipment of the coal, and that damages under the contract for failure to deliver any of the coal could not be recovered by plaintiff unless it alleged and proved that it gave unconcelled orders and shipping instructions therefor, and that it fully performed the contract on its part or facts showing a legal excuse for the non-performance, which allegations and proof it did not sufficiently make. In the case of U. S. Smelting Co. v. American Galvanizing Co., 236 Fed. Rep. 596, it appears that the merchandise purchased was to be delivered "f.o.b. cars East St. Louis" or "f.o.b. cars East St. Louis basis." In the present case, in addition to the provision in the contract that the coal "is to be billed out as ordered by the buyer," there is the further provision that "the price is f.o.b. mine, which is the point of delivery." In the opinion in the case just referred to (p. 598) three suppositious cases are given, as follows: "(1) A broker, or other middleman, who buys to sell again, buys for delivery to an unknown consignee at an unknown place. To get a price basis, East St. Louis is named as the place of delivery. It is not in the contemplation of either party that the goods shall be there shipped or received, but they are to go to any place named by the vendee. (2) A vender has a manufactory in East St. Louis from which he ships. A rate is made for delivery f.o.b. cars East St. Louis, with the expectation of being shipped elsewhere. (3) A vendee buys goods for delivery to himself at East St. Louis, to be there used. The goods are to be shipped in cars to East St. Louis, where the consignee is to receive them." And the court concluded: "The common sense as well as legal meaning of these respective contracts is that in the first and second cases the vendee is bound to give shipping instructions; in the third case the vender has them." We think that the contract in the present case comes within the first of said suppositious

cases. And we think that it is the law, generally, that, where shipping instructions are required to be given, or where the buyer is required to do any act, such as furnishing cars, specifications, etc., so that the seller may perform, and he being ready and willing to perform, the failure of the buyer to give shipping directions, or to perform such acts, not only releases the seller from its obligation to perform, but constitutes a breach of the contract on the part of the buyer, for which the seller can maintain an action for damages. (Briggs v. Pacific Trading Co., 223 Pac. Rep. 949; Krause v. Union Match Co., 170 N. Y. Rep. 848, 849, quoting from Williston on Sales, section 457, pp. 784-5; Christy v. Stafford, 22 Ill. App. 430, 433; Consolidated Coal Co. v. Schneider, 165 Ill. 393, 397; Hirsch v. Georgia Iron & Coal Co., 169 Fed. Rep. 578, 580; Mathes v. Knott, 138 N. C. 105, 109.) And we cannot agree with the contention of plaintiff's counsel that the effect of plaintiff's letter of August 3rd, and accompanying order for 75 "or more" cars, was to give to defendant instructions to ship not less than 75 cars per month thereafter during the remainder of the contract year, and that further shipping instructions in September and thereafter were unnecessary. This construction of the letter and order appears to us to be a strained one, and it is against the actions of plaintiff thereafter taken in giving other shipping instructions, and in directing defendant, on December 30th, to discontinue further shipments of prepared coal to Chicago. Nor can we agree with counsel's further contention that the contract was "severable" as to each month, and that any possible lack of shipping instructions could not constitute a default on plaintiff's part which would bar a recovery as to defendant's earlier defaults. The trial court refused to instruct the jury, as requested by plaintiff, that it was a severable contract. In Kesler v. Clifford, 165 Ill. 544, 547, it is said "The question, whether a contract is entire or severable, cannot be determined by any

precise rule, but must depend upon the intention of the parties, which in each case is ascertained from the language employed, and the subject matter of the contract." (See, also, Harris v. Albany, 159 Ill. 627, 648.) One of plaintiff's witnesses testified that in the coal business there is what is known as the coal year, extending from April 1st to March 31st of the succeeding calendar year; that the contract in question was not the first one entered into between the parties; that they had had a contract for the preceding coal year; and that negotiations regarding the present contract commenced prior to the termination of the former one and continued until April 21, 1920, the date the present contract was executed. It thus appears that the parties contemplated and did enter into yearly contracts, although in the present one deliveries and payments were divided into monthly periods. While the present contract does not specifically say that plaintiff purchases 900 cars of coal, the purchase of "75 cars per calendar month" from April to March, both included, amounts to a purchase of 900 cars, to be delivered in monthly installments. That plaintiff, at the commencement of the present action, considered it had made a purchase of 900 cars (subject to restricted production at the mine), is evidenced by the allegations of the first count of its declaration wherein it is stated that it bargained with defendant to buy "900 cars of bituminous coal," etc. The prices mentioned in the contract (increasing 10 cents per month for several months) and the clauses relating to strikes, car shortage and restricted production all tend to show that the parties intended to make an entire and single contract for the coal year. Furthermore, neither of the parties in the performance of the contract treated it as a severable contract. Orders were not given or deliveries made according to months.

And we think that the damages of $38,000, as assessed by the jury, are so excessive as to require a reversal of the judgment.

Plaintiff's action is for failure to deliver. No claim is made for delay in deliveries. The evidence discloses that, as to most of the cars ordered by plaintiff, they were either shipped and accepted, or the orders cancelled, or the cars ordered to be withheld. Among the many instructions given to the jury was one that plaintiff was not entitled to receive any damages for defendant's failure, if any, to deliver any coal under the contract to plaintiff f.o.b. the White Ash mine, "except the failure, if any, to deliver such coal as * * plaintiff gave or offered to give to defendant orders or directions to bill out from said mine, and did not thereafter cancel or request that shipment as ordered be withheld." The jury evidently ignored this instruction, and assessed the damages along the lines as argued by plaintiff's attorney and in substantial accord with the "Tables," as mentioned in the foregoing "Statement by the Court". An examination of these tables, particularly tables "D" and "E", discloses that they are based upon the theory that plaintiff was not obliged in the first instance to furnish shipping instructions. And we think, therefore, that the argument of plaintiff's counsel based on the tables, cannot be supported by law, and that the jury were misled by the argument, made in connection with the further argument concerning sales by defendant of coal from the mine at greatly increased prices to parties other than those with whom defendant had yearly contracts. Furthermore, the total number of cars "short" (336) at the end of December, as shown in Table "D", is but two cars less than the total number of cars ordered by plaintiff, shown by the evidence to be 338, whereas the evidence shows that many of the ordered cars were either received by plaintiff, or the orders cancelled, or the cars ordered withheld for future instructions which were not given.

In view of our holdings it is unnecessary for us to consider the other points made by defendant's counsel as to

claimed errors of the trial court in its rulings on evidence submitted, or as to claimed errors in certain instructions, or to consider the cross-errors assigned by plaintiff's counsel.

Our conclusion is that, for the reasons stated, the judgment of the Superior Court should be reversed and the cause remanded, and it is so ordered.

REVERSED AND REMANDED.

Witch, P. J., and Barnes, J., concur.

404 Sa

142 - 29231

WILLIAM H. KLIGE,
Appellee,

vs.

AMERICAN INSURANCE UNION,
Appellant.

235 I.A. 609
APPEAL FROM COUNTY COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a certificate for $500, issued to him by defendant, a beneficiary society, on July 27, 1915. On the trial in December, 1923, the jury found the issues in his favor and assessed his damages at $500. Judgment was entered against defendant for said sum and this appeal followed.

From the certificate, set forth in plaintiff's declaration, it appears that, if the member, after two years continuous membership "becomes permanently and totally disabled from following ANY occupation or profession, or engaging in or directing any business whatever, by reason of any disease or accident, which disability is not the result of a hazardous or prescribed occupation, and is not the result of his own immoral or intemperate, vicious or illegal conduct," the society agrees to pay the member $500, within 60 days after approval of written proofs, etc. It is further provided that "the conditions of said payment are more fully set forth in sections 10 and 11 of Article 1 of the Constitution reprinted on the back hereof." Said sections are set forth. Section 10 states that the "loss of BOTH HANDS, the loss of BOTH FEET, and the loss of BOTH EYES" are "hereby declared to be permanent and total disabilities." Section 11 states the method to be followed by a member, having become permanently and totally disabled, etc., in order that he may

receive the benefit. Plaintiff's declaration avers that, on or about January 26, 1921, while in good standing and after two years continuous membership, he "became permanently and totally disabled from following any occupation or profession, or engaging in or directing any business whatever, by reason of an accident," resulting in the loss of plaintiff's left leg; that he notified his chapter of the accident, etc.; that he had kept and performed all the laws and regulations of his chapter and of the society, etc.; that about April 15, 1921, the defendant sent a letter, signed by one of its secretaries, writing in part that "the loss of one limb does not constitute total and permanent disability," and that the society "could not legally make any settlement on the basis of total and permanent disability for that loss;" and that defendant still refuses to pay to plaintiff any sum, etc. Defendant filed a plea of the general issue, and two special pleas.

On the trial plaintiff introduced in evidence the certificate sued upon. By it defendant certified that it had received plaintiff into its membership and had insured his life in the sum of $1000, payable to his mother upon his death; that it had agreed to pay him $500 if, after two years continuous membership, he should become permanently and totally disabled from following any occupation or profession by reason of any disease or accident, etc., and that it had further agreed, after he had reached the age of 70 years or more, in case of temporary or permanent physical disability either as the result of disease, accident or old age, to pay him $500, under certain named conditions.

Plaintiff was a witness in his own behalf and his testimony was in substance as follows: That, when about 19

years of age, he joined the Logansport, Indiana, chapter of the defendant society in July, 1918, and received said certificate; that he has resided in Logansport all his life; that on January 24, 1921, when he received his injuries, he was a member of the society in good standing, and had been continuously for more than two years prior thereto; that his trade was that of a boiler-maker; that while attempting to board a moving train at McComb, Mississippi, his left leg was so seriously injured as to necessitate its amputation about four inches below the knee; that in about ten days he was taken to his home in Logansport, and for a considerable period was not able to do any work; that he procured an artificial leg, but found that at first he could not stand on the leg for any great length of time and, hence, was unable to do the heavy work he had been accustomed to do; that in November, 1921, he started to do work as an automobile repair man in a garage, "grinding valves and helping to take up bearings," and continued doing this work for eight or more months, working about five days each week; that about September, 1922, he obtained employment in his "old line of work" at the shops of a railroad company at Logansport, but found that he could not do it, so he thereafter did "riveting" and other work usually done by a boiler-maker's helper for nine months or more; and that he quit his employment with the railroad company in October, 1923, since which time he has not been employed.

Among the errors assigned by defendant's counsel for a reversal of the judgment are (1) that the verdict is against the law and the evidence, and (2) that the trial court erred in overruling defendant's motion for a new trial. We are of the opinion that these errors are well assigned.

It appears that defendant was not an accident insurance company insuring persons against accidents received while engaged in their respective vocations, but was a beneficiary association

insuring the lives of its members and also insuring them against permanent and total disability from following any business by reason of disease or accident, and also insuring them, after they reached 70 years of age, against temporary or permanent disability as the result of disease, accident or old age. Plaintiff's insurance was not strictly what may be termed vocational insurance. (B. & O. Employees' Relief Ass'n. v. Post, 122 Pa. St. 579, 600; Holcomb v. Grand Lodge Brotherhood Railroad Trainmen, 171 Ky. 843, 846.) Plaintiff was insured, by the particular clause of the certificate in question, against becoming "permanently and totally disabled from following any occupation or profession or engaging in or directing any business whatever, by reason of any disease or accident." This language is clear and unambiguous, and it is the duty of the courts to construe insurance contracts according to their plain terms and to enforce them as made. (Crosse v. Knights of Honor, 254 Ill. 80, 86; Kelly v. Brotherhood of Railroad Trainmen, 308 Ill. 508, 514.) It was stipulated in the certificate that the loss of both hands, or both feet, or both eyes should be considered as a permanent and total disability. This did not mean that a recovery under the certificate could not be had if the proof showed a case of permanent and total disability, other than by either of such losses. (Knightsbury's Union v. Colehouse, 237 Ill. 561, 565.) But, whether the loss of plaintiff's left leg below the knee rendered him permanently and totally disabled from following any occupation or engaging in or directing any business depended upon the facts shown. And plaintiff's own testimony clearly disclosed that he was not so permanently and totally disabled, as a result of the accident. (See, Albert v. Order of Chosen Friends, 34 Fed. Rep. 721, 722; Lyon v. Railway Passenger Assurance Co., 46 Iowa 631, 634; B. & O. Employees' Relief Ass'n. v. Post, supra; Cleveland v. Fidelity

& Casualty Co., 30 N. W. Rep. 237, 239.)

For the reasons indicated the judgment of the County Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

404 Ca

151 - 29240

235 I.A. 609

J. GOODMAN, Appellee, vs. WILLIAM MULHOLAND, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 30, 1921, plaintiff commenced an action in assumpsit in the Superior Court of Cook County against defendant to recover one-half of the sum of $2,400, received by the latter as commissions for the consummation of a sale to Samuel Zak about July 1, 1921, of certain improved real estate, owned by one Ahrmann and situated on the southeast corner of Wellington street and Broadway, in the city of Chicago. The jury returned a verdict for plaintiff in November, 1923, for $1350, being the $1200 claimed and interest thereon of $150. Judgment was entered upon the verdict against defendant and he appealed.

Plaintiff's declaration consisted of a special count and the common counts. In the special count plaintiff alleged in substance that both he and defendant were licensed real estate brokers in Chicago; that about January, 1921, defendant was authorized by Ahrmann to negotiate a sale of the premises, and thereafter defendant expressly agreed with plaintiff that, if he (plaintiff) procured a purchaser upon terms acceptable to Ahrmann and a sale was consummated, he would pay plaintiff one-half of the commissions received; that thereafter, about July 1, 1921, plaintiff procured a purchaser who offered to pay $80,000 for the premises and the sale was consummated; and that defendant received $2,400 as commissions, one-half of which sum he has refused to pay plaintiff. Defendant, stating that he was doing

business as William Mulholland & Company, filed a plea of the general issue.

On the trial plaintiff was a witness in his own behalf and he called as witnesses Albert Crosby, Louis Hechtman, Mulholland, and Samuel Zak, the purchaser. Defendant also testified in his own behalf and he called as witnesses Ernest H. Gerley and Annie Cohen. Certain writings and telegrams were also put in evidence. It was not disputed that defendant received $2,400 as commissions and that one-half of this amount was credited to Gerley on defendant's books, or those of William Mulholland & Co., for his claimed services in consummating the sale. Defendant testified that for many years he had been engaged in Chicago as a real estate broker, doing business under the name of William Mulholland & Co.; that about January, 1921, Ehrmann had listed with him the premises for sale at the price of $90,000; and that "I had an exclusive agency up to the time they were sold and whatever negotiations were had with other brokers were had through my office and I engaged the services of different brokers to help effect a sale." Defendant admitted that early in March, 1921, he told plaintiff that if he could find a purchaser on terms acceptable to Ehrmann he (defendant) would divide commissions with him. Defendant further testified that after July, 1919, Gerley was a salesman in defendant's office, was not an independent licensed broker, that whatever real estate business Gerley did was done in defendant's name and for his account and under his license, and that Gerley was merely his employee "on a percentage basis". Gerley testified to the same effect. But defendant's witness, Annie Cohen, bookkeeper for William Mulholland & Co., after stating that she had there been employed since about 1918, testified on cross-examination that the members of the firm were Mr. Mulholland, Mr. Gerley (since 1919) and Clyde H. Bailey (since May, 1923).

The main question of fact to be determined by the jury was, whether the negotiations which plaintiff had with Zak, and the efforts which he expended to get Zak to finally make the purchase, were of such material assistance as entitled him to one-half of the commissions, - in other words, whether he was the procuring cause of the sale. It appears in substance from plaintiff's testimony, corroborated in some essential particulars by other witnesses, that he first procured from Morris & Gordon an offer of $80,000 for the premises, which was submitted to Ehrmann through defendant, but that the price was not then satisfactory to Ehrmann and nothing came of these negotiations; that he then commenced negotiations with Zak and was informed by the latter that some time previously he (Zak) had received a letter from defendant regarding the premises, quoting $90,000 as the price and making certain suggestions as to how a purchase at that price might be financed, but that, as the proposition did not look good to him, he (Zak) had dropped the matter; that plaintiff after several interviews re-awakened Zak's interest as a possible purchaser; that thereupon in March, 1921, plaintiff saw defendant and told him the substance of his negotiations with Zak, suggesting that defendant might consider Zak as his client because of defendant's previous letter to Zak, and asked defendant if he might continue negotiations with Zak as a broker, and that thereupon defendant said: "You are a good salesman; you might do better with him that I could; you show him the property; if you succeed in selling the property I will divide commissions with you;" that a day or two later plaintiff showed Zak the premises, took him through the building and procured an offer from him of $80,000 for the property, of which offer plaintiff advised defendant; that this offer was communicated to Ehrmann by telegram but he then refused it; that plaintiff continued his negotiations with Zak, endeavoring to get him to raise his offer; that the property was finally sold

to Zak for $80,000, with Ehrmann's consent, during a period when plaintiff was out of the city, the negotiations with Zak being conducted during that period by Gerley; that before plaintiff left the city he saw defendant and told him of the situation as to the negotiations and of his being obliged to go away; that thereupon defendant said: "Take Gerley over to Zak and introduce him; and, in your absence, if there is any chance of making the deal and it is made, you will get your commissions;" that thereupon plaintiff introduced Gerley to Zak and told Zak that Gerley would continue the negotiations during plaintiff's absence; that Zak said he would not pay more than $80,000, no matter who did the negotiating; that after his return to Chicago he learned that the sale had been made for $80,000; that he called upon defendant and demanded one-half of the commissions; and that defendant refused to pay him anything, saying "You have nothing to do with the deal; we made the deal with Zak; I had Zak before you." That plaintiff was active, as well as cautious, in his negotiations with Zak is corroborated by Zak's testimony to the effect that plaintiff "pestered the life out of me," and that he (Zak) had never met Gerley until plaintiff introduced him just prior to plaintiff going out of town. Gerley testified that he had met Zak before, and defendant denied having the two conversations with plaintiff, above mentioned, wherein, according to plaintiff's testimony, he (defendant) told plaintiff to show Zak the property, etc., and wherein, on the eve of plaintiff's leaving town, he told him in effect that if the negotiations were consummated by Gerley, during plaintiff's absence, he would nevertheless be paid his commissions.

It is contended that the verdict is against the weight of the evidence on the question whether plaintiff's efforts were the procuring cause of the sale. Under all the facts and circumstances in evidence, we think that the jury was fully

warranted in finding that they were. (Higdon v. Merg, 226 Ill. 382, 387; Hafner v. Herron, 165 Ill. 242, 246.) And there was sufficient evidence to warrant the jury in finding that there was no abandonment by plaintiff of his efforts to bring about a sale. He procured Zak as a purchaser, who was willing to pay $80,000, and no more. This price was at first not acceptable to the owner, but, during plaintiff's enforced absence from Chicago and while further negotiations were being conducted by Gerley under the arrangement and understanding as shown, the owner finally agreed to sell at this price and the deal was consummated. And, in our opinion, there is no merit in the further contention of defendant's counsel that because during plaintiff's negotiations with Zak it was contemplated that the purchase, if made, would be made by Zak and his brother jointly, whereas Zak alone finally purchased the property.

And, after consideration of the court's given instructions offered by plaintiff, as well as certain refused instructions offered by defendant, we are unable to say that the court committed any prejudicial error in his rulings on instructions and in his charge to the jury, save in one particular. By the 5th instruction, offered by plaintiff, the jury were instructed in effect that if they believed from the evidence that plaintiff was entitled to $1200 (one-half of the commissions received by defendant on a certain named date), and further believed that defendant's failure to pay to plaintiff said sum "on or since said date, amounted to an unreasonable and vexatious delay of payment," then in addition to said $1200 plaintiff is entitled to interest thereon at the rate of 5% per annum from said date to the present date "and would be entitled to recover, all told, $1380." We think that the court erred in so charging the jury, and in entering a judgment against defendant which included interest of

$150 on plaintiff's claim of $1300. Payment of the commissions of $2450 was not made to defendant until about July 1, 1921, and, after his refusal to pay any part of the sum to plaintiff, the latter, before the end of the month, commenced the present action. There was no evidence showing any unreasonable and vexatious delay in payment before the beginning of the action. "Here failure to pay a demand * * will not necessarily constitute the delay in payment unreasonable and vexatious." (Fiesser v. Winkote Milling Co., 94 Ill. App. 595, 598; County of Franklin v. Layman, 145 Ill. 138, 150.) And, "to appear and defend a suit is a right which cannot be construed into 'unreasonable and vexatious delay of payment,' without impairing the right itself." (Aldrich v. Punham, 16 Ill. 403, 404; Hatterman v. Thompson, 83 Ill. App. 217, 222; Rech v. Bronson, 196 Ill. App. 518, 526.) But the error is one which can be cured by a remittitur. If, therefore, the plaintiff will file a remittitur in the sum of $150 within ten days, the judgment will be affirmed for the sum of $1300, otherwise it will be reversed and the cause remanded. Each party will pay one-half of the costs in this court.

JUDGMENT AFFIRMED, ON REMITTITUR, FOR $1300.

Fitch, P. J., and Barnes, J., concur.

163 - 29252

235 I.A. 609

LAURA F. LYNCH,
Appellee,

vs.

HERBERT NIXMAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff's electric automobile was damaged as the result of defendant's Hudson automobile colliding with it in the intersection of Grand Boulevard and 43rd Street in the City of Chicago about nine o'clock on the evening of October 14, 1922. She alleged in her statement of claim that the collision was caused by defendant's negligent operation of his car, she being in the exercise of due care in driving her automobile at the time; that the reasonable value of the necessary repairs to her car was $258.34; and that she was deprived of its use for a period of two weeks. She claimed, in addition to said amount expended for repairs, the sum of $140, being the rental value of such a car as her's for 14 days at $10 per day. Defendant claimed that she was guilty of contributory negligence before and at the time of the collision. The cause was tried without a jury, resulting in a finding in plaintiff's favor for $330.74. Judgment for this amount was entered against defendant.

Plaintiff and two eye-witnesses testified as to the details of the accident, and defendant was the only witness called in his behalf. The entire testimony tended to show that at and immediately before the time of the collision defendant was guilty of negligence in driving his car south in Grand Boulevard at an excessive rate of speed and without keeping a proper lookout ahead. Plaintiff also showed by her witness,

Meerey, that repairs were made on her car to the amount of $258.24, that they were made necessary by the collision; that it required at least two weeks time to make them; and that the amount charged was usual and customary. Meerey, whose business was that of building and repairing electric automobiles and who stated that he was familiar with the fair and reasonable rental value of electric cars similar to plaintiff's, also testified that the reasonable rental value of such a car was $125 per month, or for 14 days, one half of said sum, or $62.50. His testimony was not contradicted. The amount of the court's finding was evidently made up by allowing plaintiff the amount of said repairs, $258.24, and adding thereto $72.50, for damages for plaintiff being deprived of the use of her car for a period of two weeks. Under the testimony the finding is excessive to the extent of $10.

The main contention of defendant's counsel is that plaintiff was guilty of contributory negligence. She testified in substance that she was an experienced driver of automobiles; that on the evening in question, when it had been raining and it was misty and the streets were slippery, she was driving west on the north side of 43rd street with a friend in her car as a guest; that upon reaching Grand Boulevard she came to a full stop, and waited until six or seven cars, going north, had passed; that she then looked both south and north and, seeing no cars (except defendant's) approaching the intersection on Grand Boulevard from either direction, she started to cross the boulevard at a moderate rate of speed; that at the time she looked she saw the front lights of defendant's car "about a block away, just a little south of 42nd street;" that in crossing the boulevard she kept her eyes to the front and did not thereafter see defendant's car until just before the collision, when

it was then too late to stop her car; that just before the collision defendant's car was moving south on the west side of Grand Boulevard at a very excessive rate of speed, and, without slackening its speed, struck the front part of plaintiff's car, "smashed the batteries, machinery and so forth," and turned it towards the south. The guest in plaintiff's car testified by deposition, as follows: "He was coming at a high rate of speed, I should say not less than 30 or 35 miles per hour. * * He hit us in the hub of the right fore wheel. His car was a large one, either 5 or 7 passenger, and when the concussion took place, he swung our car around to the left facing south, and shoved it almost to the south line of 43rd street. Owing to the wetness of the paving it did not turn over, which otherwise might have been the case." Defendant's counsel argue that defendant's car was approaching the intersection from plaintiff's right and defendant had the right of way, under the provisions of section 33 of the Motor Vehicle Act, and plaintiff was guilty of negligence in not yielding to defendant such right of way and in not stopping her car in time to allow defendant's car to pass in front. As plaintiff's car entered the intersection first and at a time when defendant's car was nearly a block away from the intersection, we think that the former had the right of way (Palmer v. Wilson, 227 Ill. App. 296,) and that plaintiff had the right to assume that defendant's car, moving at a lawful rate of speed, would not reach the intersection until plaintiff's car had crossed the same in safety. As it seems to us, plaintiff's acts were proper and she did not negligently contribute to the collision, which was solely occasioned by defendant's negligence in not seeing plaintiff's car and in continuing on across the intersection at an excessive rate of speed.

And we think that plaintiff, in addition to the amount of the repair bill, was entitled to recover a reasonable sum for

the loss of the use of her automobile while she was necessarily deprived of its use during the two weeks period when the necessary repairs were being made on it. (Travis v. Fierman, 45 Ill. App. 579; McConnell v. Lake Erie & Western Ry. Co., 208 Ill. App. 442, 450.) Such reasonable sum was sufficiently shown to be $42.00.

Counsel complain that defendant was prejudiced be cause, in a question asked of defendant on cross examination, the suggestion was made that defendant carried liability insurance on his automobile. We do not think there is any merit in the point, especially as the cause was tried before the court without a jury.

As above stated we think that under the proof made the finding and judgment are excessive to the extent of $10, but this error can be cured by a remittitur. If, therefore, plaintiff within ten days shall file a remittitur of $10, the judgment will be affirmed for $320.74, otherwise it will be reversed and the cause remanded. If such remittitur is filed, the costs in this court will be taxed against the appellant, Niemann.

AFFIRMED ON REMITTITUR FOR $320.74.

Fitch, P. J., and Barnes, J., concur.

264

175 - 29264

235 I.A. 609

CLARENCE ROY PEEBLES,
Appellee,

vs.

STATIONERS ENGRAVING COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SHIRLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for $1876.12, rendered after verdict by the Municipal Court of Chicago on December 17, 1923, in an action upon a written contract for commissions claimed to have accrued thereon. Defendant claimed that at the date of the termination of the contract there was only due plaintiff for commissions the sum of $11.23. The contract, dated September 13, 1916, is as follows:

> "This confirms verbal agreement between C. R. Peebles and the Stationers Engraving Company, as follows:
> On all agencies established by said C. R. Peebles for the Stationers Engraving Company, C. R. Peebles is authorized to collect $10, which he is to retain as full payment for his services. We agree to return $10 to said agency after they have sent to us and paid for $100 worth of business. We agree to allow C. R. Peebles a 5% commission on all business over and above the first $100 net which we receive from any of said agencies during the term of C. R. Peebles' contract with us. On accounts which we now have on our books no commission is to be allowed.
> Further it is understood that we reserve the right to name the towns he shall visit in our interest, and what towns are not to be visited.
> All contracts which C. R. Peebles makes with agencies are to be drawn up on the printed Agency Contract forms with which we furnish him, and are to be signed by C. R. Peebles for the Stationers Engraving Company, and acceptance is to be signed by the Agent. A duplicate of the contract is to be left with the Agent.
> It is further understood and agreed that on contracts not acceptable to Stationers Engraving Company for the reasons of credits, etc., that the Stationers Engraving Company reserve the right to cancel these contracts, and C. R. Peebles is to return to agent the $10 collected as a deposit.
> It is understood that this agreement is to remain in

force for a period of three years, but it is also agreed that this contract can be terminated by either party upon thirty days' notice.

STATIONERS ENGRAVING COMPANY
By Guy J. Gibson

ACCEPTED: C. R. PEERLESS,
Chicago, Ill."

In his statement of claim, after setting forth the contract in haec verba, plaintiff alleges that his claim is for a balance due for commissions at the rate of 5% on certain accounts secured by him for defendant under and by virtue of the terms of the contract and that notice was served by defendant on November 9, 1916, to terminate the contract. In his affidavit of claim accompanying said statement he alleges that there is due to him from defendant "the sum of at least $2,000, the amount in excess thereof plaintiff being unable to determine and state, owing to the fact that the information disclosing the same is in the sole and exclusive possession and control of defendant." Plaintiff demanded a jury trial. Defendant, in its affidavit of merits, alleged that the contract was terminated on November 9, 1916, at which time the differences between the parties, if any then existed, were adjusted.

On November 3, 1923, prior to the trial, on plaintiff's motion and over defendant's objection, the court ordered defendant to produce for plaintiff's examination the books, records, etc., of defendant, showing the amount of business done by all agencies established by plaintiff from the date of their establishment (whether before or after the date of the contract, September 15, 1915) and until three years after the date of the contract. Defendant contended that, as the contract provided that it could be terminated by either party upon thirty days' notice and as it was admitted in the pleadings that defendant had given notice of such termination on November 9, 1916, the contract had in fact been terminated as of December 9, 1916, and, hence, plaintiff

[illegible]

could not recover commissions on business received by defendant from said agencies after said date and the court should limit the scope of the examination of the books, etc., as to business received by defendant from said agencies, from September 15, 1915, (date of contract), to December 9, 1916, only. The court allowed the examination of the books to the extent as requested by plaintiff and such examination was made.

On the trial, which was had early in December, 1923, plaintiff's evidence showed that immediately upon the execution of the contract he commenced work thereunder and continued to solicit and secure agencies for defendant until about November 9, 1916, when notice of the termination of the contract was given by defendant; that thereafter he ceases doing any further work under the contract; that up to that time he had established a large number of agencies for defendant; and that prior to the date of the signing of the contract he had been working for several weeks for defendant, soliciting trade accounts and establishing agencies, under a verbal agreement. Although, as appears from the statement of claim, plaintiff's action was based solely upon the written contract of September 15, 1915, he claimed that the prior verbal agreement was precisely the same as was later set forth in the written contract, and that it was understood when the written contract was executed that it should cover work done by him prior thereto. Defendant, on the contrary, claimed that the verbal agreement was that plaintiff should solicit accounts and establish agencies, that his sole compensation for this work was the $10 collected from the agent at the time the agency was established, and that defendant first suggested the allowance of a commission to plaintiff just prior to the signing of the written contract. The trial court, over defendant's objection, allowed plaintiff to testify to a conversation he had, prior to the signing of the written contract, with Guy J. Gibson, vice president of defendant,

to the effect that Gibson then stated that on accounts received from agencies established by plaintiff prior to the date of the written contract plaintiff would be allowed a 5 per cent commission the same as if said agencies had been established and accounts received after said date, and this ruling was made notwithstanding the provision of the contract, viz: "On accounts which we now have on our books no commission is to be allowed." The court also admitted, over defendant's objection, evidence of business received by defendant from agencies established by plaintiff prior tothe signing of the written contract, and also evidence of accounts of customers which were on defendant's books at the date of its execution. The court also allowed plaintiff, over defendant's objection, to testify to a conversation he had with Gibson, to the effect that the provision contained in the last paragraph of the written contract, relative to its termination by either party on notice, meant that defendant had the privilege of serving notice on plaintiff to establish no more agencies, but that plaintiff would be entitled to his 5 per cent commission during the full period of the contract (three years) regardless of when the contract was terminated. The court also admitted, over defendant's objection, evidence of business received by defendant after the termination of the contract from agencies established by plaintiff during the time the contract was in force, and upon which business so received plaintiff claimed commissions. We are of the opinion that in all these particulars the rulings of the court were erroneous and prejudicial. Plaintiff's testimony as to said conversations amounted to an attempt to vary by parol evidence the terms of a written contract, which, as it seems to us, is plain and unambiguous. By the first clause of the contract plaintiff was to retain the $10 collected from any agency established by him "as full payment for his services," and he was also to be allowed a 5% commission on all business over and above the first $100 net received by defendant

from any such agency "during the term" of the contract (i. e. during the period of time the contract was actually in force.) In the last clause of the contract that time was fixed at three years, but either party has the privilege of making it a shorter time upon giving thirty days' notice. After the notice of termination, admittedly given by defendant on November 9, 1916, the contract according to its terms was as much at an end on December 9, 1916, as if no notice had been given and the full three years had expired. Courts should not so construe a contract, which is plain and unambiguous, as to make it different from what its words express, - their duty being "to declare the meaning of what is written in the instrument, not of what was intended to be written." (22 C. J., p. 1179, sec. 1571.) "Where the language used is clear and unambiguous, extrinsic evidence is not admissible on the ground of aiding the construction, for in such case the only thing which could be accomplished would be to show the meaning of the writing to be other than what its terms express, and the instrument cannot be varied or contradicted under the guise of explanation or construction." (22 C. J., p. 1177, Sec. 1570.) In Armstrong Paint Works v. Continental Can Co., 301 Ill. 102, 105, it is said:

> "The Municipal Court permitted the paint company over the objection of the can company, to prove conversations between representatives of the respective companies while negotiations leading up to the contract in question were in progress. This was error. In construing a contract it is proper for a court to take into consideration the surrounding circumstances. It should place itself as nearly as it can in the same situation as the parties who made the contract, so that it may view the circumstances as they viewed them and so it may judge the meaning of the words and their application to the things described as the parties judged and applied them. * * But this does not give either party the right to establish a different contract from that expressed in the written agreement. When parties sign a memorandum expressing all the terms essential to a complete agreement they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing."

Defendant's counsel also contend that the court erred in giving to the jury certain instructions and in refusing certain other instructions offered by defendant. Inasmuch as the judgment must be reversed and the cause remanded for a new trial for the reasons above mentioned, and as the claimed errors in the instructions are not likely to be repeated on the new trial, a discussion of said instructions is unnecessary.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

176 - 29265

235 I.A. 610

WALTER W. PEEBLES,
Appellee,

vs.

STATIONERS ENGRAVING COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for $1,061.89, rendered after verdict by the Municipal Court of Chicago on January 3, 1924, in an action upon a written contract for commissions claimed to have accrued thereon. The contract, dated September 14, 1915, is exactly the same in its terms as the contract between C. R. Peebles (brother of plaintiff) and defendant, which is set forth in full in the opinion of this court, this day filed, in the case entitled "Clarence Roy Peebles v. Stationers Engraving Co.," case No. 29264. A thirty days notice of termination of the contract was given by defendant on January 3, 1917, at which time plaintiff ceased to work under the contract.

The court, over defendant's objection, allowed plaintiff, as well as C. R. Peebles, to testify to certain similar statements made to them by Guy J. Gibson, vice president of defendant, with reference to the meaning of certain clauses in the contract, and to introduce certain similar evidence, as is shown in our opinion in the Clarence Roy Peebles case No. 29264. In other words, substantially the same errors were committed. There was also a dispute as to whether plaintiff was entitled to commissions on the so-called "Baer" account. For the reasons indicated in our said opinion, in case No. 29264, this day filed, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

40-22

191 - 29280

EVA SCHNEIDER, ETHEL DICKINSON and MARY MATTHEWS,
Complainants and Appellees,

vs.

HERMAN KRUGER, BERTHA KRUGER, his wife and others.
Defendants.

BERTHA KRUGER,
Appellant.

235 I.A. 610

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Bertha Kruger from a decree of the Circuit Court of Cook County, entered after a hearing in open court on December 13, 1923, wherein the court set aside a quit claim deed (executed by Herman Kruger on January 5, 1918, conveying to Bertha Kruger, his wife, four parcels of improved real estate in Cook County, Illinois) and subjected said real estate to the lien of a deficiency decree and judgment, entered against Herman Kruger and others on January 18, 1919, for the sum of $8009.41, together with interest accrued and to accrue at the legal rate.

Complainant's original bill was filed on May 19, 1919, to which Herman and Bertha Kruger filed an answer. The two other defendants, William H. Barry and Ira M. Green, were defaulted and subsequently the bill was dismissed as to them. While the bill was pending Herman Kruger died on June 4, 1922, leaving a will, which was probated and of which Bertha Kruger was appointed executrix by the Probate Court of Cook County. By the terms of the will Herman Kruger devised and bequeathed all of his estate to Bertha Kruger. On January 30, 1923, complainants filed an amended and supplemental bill, making Bertha Kruger,

as executrix, and the five sons (all of legal age) of Herman Kruger, additional parties defendant, and Bertha Kruger, individually and as executrix, filed her answer thereto. Four of the five sons filed a joint and several answer, but Max Kruger failed to appear and he was defaulted. To all answers complainants filed replications.

Many of the material facts as alleged in complainants' bills were admitted by the answers. Complainants called Bertha Kruger as their witness and she was examined and cross-examined at length. They also called four witnesses, engaged in the real estate business, who testified as to the values of the respective parcels of real estate mentioned. Only one witness was called by defendants and he gave his opinion as to the value in 1918 of a certain piece of real estate, formerly owned by Herman Kruger, and which was sold under the foreclosure decree hereinafter mentioned. Certain documentary evidence was introduced.

In the decree appealed from the court found inter alia that the equities of the cause were with complainants; that on October 19, 1913, Herman Kruger was indebted to Margaret Dickinson, mother of the complainants, in the sum of $20,000, as evidenced by two of his notes, due in five and ten years respectively, and bearing interest, payable half-yearly, and secured by a certain trust deed; that on June 19, 1917, Margaret Dickinson commenced a suit to foreclose the trust deed in said Circuit Court; that while the suit was pending she died testate, and, on January 30, 1918, Eva Schneider and Ethel Dickinson (two of the complainants herein), as executrices of her will, were substituted as complainants; that thereafter such proceedings were had that, on May 10, 1918, a decree of sale was entered, and, on June 3, 1918, the real estate was sold, but there remained a deficiency amounting to $8009.41; that on January 16, 1919, a deficiency decree was entered against Herman Kruger, William H. Barry and Ira E. Green, in which the court

decreed that they were personally liable to pay the deficiency and that execution be issued, etc.; that on April 21, 1919, the sheriff returned the execution "no part satisfied," stating that said Kruger had delivered to him a schedule of his personal property and that he was unable to find other property on which to make a levy; that in the final settlement in the Probate Court of the estate of Margaret Dickinson the three complainants in the present action became, and now are, the owners of said deficiency decree and judgment of $8009.41, and that there is now equitably due to them the amount thereof, together with legal interest from January 18, 1919; that on January 5, 1918, said Kruger was the owner in his own name of the four parcels of improved real estate now in question (severally describing them); that on said date parcel No. 1, located at 3933-5 Pine Grove Avenue, Chicago, was of the value of $60,000 and encumbered with a mortgage for $50,000; that on said date parcel No. 2, located at the corner of Kedzie Boulevard and Palmer Square, Chicago, was of the value of $80,000 and encumbered with a mortgage for $30,000; that on said date parcel No. 3, consisting of a two-story building used for tailoring shops, was of the value of $15,000 and was encumbered with a mortgage for $5,000; that on said date parcel No. 4, located at the corner of Lincoln and Berry avenues, Chicago, was of the value of $60,000 and was unencumbered; that on said date Herman Kruger by quitclaim deed (thereafter recorded) conveyed all four of said parcels of real estate to Bertha Kruger, his wife; that the same was all the real estate and all the property that he then owned, except $10,000 in personal property; that at the time of the conveyance "no valuable consideration was given by Bertha Kruger to Herman Kruger for said conveyance, but that the same was made * * to satisfy a demand that she then claimed to have against him for money advanced and loaned through a long period of years, * * said

claim aggregating at the date of said deed the sum of $15,500;" that before her marriage to him she had received from a relative in Europe $1000, which she turned over to him after marriage and about the year 1889, and which he used at the time in opening a tailoring shop in Chicago; that from 1889 down to about January 3, 1911, (seven years before the date of said conveyance) she claimed that she from time to time had advanced and loaned to him various sums of money, aggregating, with unpaid interest, on January 3, 1918, the total sum of $15,500; that no note or other evidence of indebtedness was given by him to her, or demanded by her, and he only paid interest on said advances as he felt inclined; that from 1889 down to 1915 he was engaged in said tailoring business, conducted in his own name, and during the period he bought, sold and speculated in real estate; that the moneys so claimed to have been advanced were used by him in conducting his business and in said speculations, except that early in said period a dwelling house, located on Rockwell street, Chicago, was purchased by him and the title taken in her name, but that the house was thereafter sold and the proceeds used or invested by him; that on January 3, 1918, the four parcels of real estate, so conveyed by him to her, were of the total value of $215,000, and that the clear equity in them, less the mortgages which were on three of them, amounting to $150,000; that at the time of the conveyance he was indebted to the estate of Margarey Dickinson in the sum of over $20,000 and because of the conveyance he "rendered himself insolvent and unable to pay the amount of said two notes aggregating $20,000 * * and he did not retain enough money, property or estate to satisfy or pay his then existing creditors," though he retained the sum of $10,000 - consisting of $6,000 in real estate mortgage bonds, $3,000 in Liberty bonds and $1,000 in a bank account, all of which he expended within a period of nine months following the date of the conveyance for personal and family expenses, and in travel to California and

other places for the benefit of his health; that said conveyance to Bertha Kruger, excepting as to her claim of $15,500, was "wholly voluntary," and no other valuable consideration was paid by her to him for the same, that the clear equity of any one of the four parcels of real estate was greater than the amount of her claim, and that the value of the equity in the four parcels was greater by $134,500 than the amount of her claim; that the conveyance of the four parcels, to the value of $134,500 thereof, "was wholly voluntary and without any valuable consideration, * * and was fraudulent as to complainants, and should be set aside and the real estate subjected to the payment of complainants' claim;" that the parcel of real estate, above mentioned as parcel No. 1, was at the death of Herman Kruger, and is now, occupied in part by Bertha Kruger as her homestead and she has a homestead interest therein to the extent and value of $1,000; that the property, being a six-apartment building on two lots, is not capable of division or partition; that her homestead interest cannot be set off to her without prejudice and injury to the rights and interests of all parties concerned; and that the property is worth more than $1,000.

And in the decree the court adjudged that the quit claim deed of Herman Kruger to Bertha Kruger, dated January 3, 1918, and conveying the four parcels of real estate, "is as to the complainants herein * * null and void, and said deed is hereby cancelled and set aside;" that the deficiency decree against Herman Kruger, Barry and Green for $8,009.41, together with interest thereon accrued and to accrue, is a lien on all of the four parcels of real estate; that, unless Bertha Kruger within three days pays to complainants the amount of the deficiency decree, together with all accrued interest and the costs of this proceeding, the real estate, or so much thereof as necessary, be sold, etc.; that all of the parcels be sold "subject to the encum-

brances" thereon at the time of the commencement of this action, and "subject to the dower right of Bertha Kruger," and "subject further to the lien of $15,500" in her behalf for moneys advanced by her to Herman Kruger in his lifetime; that the parcel, mentioned as parcel No. 1, to be sold free and clear of the homestead interest and estate of Bertha Kruger, provided that said parcel produces at the sale more than $1,000 over and above the encumbrance; that a master in chancery (naming him) make the sale and execute the decree, and give public notice of the sale, etc.; and that out of the proceeds of the sale of said parcel No. 1, the master pay to Bertha Kruger $1,000 for her homestead estate therein, retain his fees and disbursements, etc. and then pay to the complainants the amount due under this decree, and their costs, if the remainder of the proceeds be sufficient, and if not sufficient that he apply the same as far as it may reach and report the deficiency, and if there be a surplus that he bring it into court to abide a further order, etc.

After a careful consideration of admitted facts as shown by the pleadings, and of the testimony introduced at the hearing, particularly the testimony of Bertha Kruger, we are of the opinion that the findings of thecourt in the decree, and the relief therein granted to the complainants, were fully warranted. Counsel for Bertha Kruger contend in substance (1) that the decree is not supported by the evidence; (2) that the decree is broader than the bill; (3) that the bill is defective in certain particulars; (4) that on January 3, 1913, Herman Kruger was solvent - his only indebtedness being that of $30,000 to the Dickinson estate which indebtedness was amply secured by the mortgage then in process of foreclosure; (5) that complainants, having called Bertha Kruger as their witness, her testimony must be taken as true in the absence of countervailing testimony; and (6) that, inasmuch as there was ample equity in the property mortgaged to secure the $30,000 debt to the Dickinson estate (the deficiency

decree to the contrary notwithstanding), and as Barry and Green were also liable to pay any deficiency in the event there was a deficiency, and as the testimony does not show any actual intent to defraud on the part of the Krugers when the quit claim deed of January 3, 1918, was executed, subsequent events cannot change the validity of that conveyance. We do not think that under the facts as disclosed in the present record and under the law there is any substantial merit in the contentions. From the uncontradicted testimony of the witnesses as to values called by complainants the court found in the decree that, at the time of the execution of said quit claim deed of January 3, 1918, there was a clear equity in the four parcels of real estate, over and above the mortgages therein, of $150,000, and, the alleged claim of Bertha Kruger against her husband for money loaned being for $15,500, that the value of said equity over and above her said claim was $134,500. Hence it appears that, treating her claim as a bona fide one, as the court did, the consideration for the conveyance was grossly inadequate. It is well settled that, where a conveyance is made by one, when in failing circumstances, to his wife for a grossly inadequate consideration, such conveyance stands on the same footing as a voluntary conveyance, and, as to pre-existing creditors who are hindered and delayed thereby, will be set aside in equity, and, if the grantee is free from the imputation of fraud, will be sustained to the extent of the consideration only and set aside as to the balance (Patrick v. Patrick, 77 Ill. 555; Payne v. Miller, 103 Ill. 442, 445; Hayes v. Minier, 308 Ill. 22, 28.) And it is also the law that, where a voluntary conveyance or one upon a grossly inadequate consideration is made, the burden of proof is on the grantee to show that the grantor retained ample property to pay his pre-existing creditors, and the proof must be clear and satisfactory. (Dunphy v. German, 29 Ill. App. 132, 135; Murrie v. Carter, 222 Ill. App. 447, 450; Dillman v. Nadelhoffer,

162 Ill. 628, 631; Kennard v. Curran, 239 Ill. 122, 129.) and it is not necessary to show that the grantor was actually insolvent at the time of the conveyance. (Hauk v. Van Ingen, 196 Ill. 20, 28; Kennard v. Curran, 239 Ill. 122, 129.) and such a conveyance must be considered as fraudulent as to existing creditors, even though the grantor retains property apparently sufficient in value to satisfy all of his indebtedness, where, as evidenced by results, the property retained was not in fact sufficient for that purpose. (Morris v. Carter, supra; Patterson v. McKinney, 97 Ill. 41, 49; Marmon v. Harwood, 124 Ill. 104, 109; Hauk v. Van Ingen, supra.) And the fact that Mrs. Kruger testified that no fraud on existing creditors was intended when the conveyance was made is not conclusive upon the court. (Podolski v. Stone, 186 Ill. 540.) "Intent to defraud creditors by the conveyance of property may be ascertained by inference, from the circumstances surrounding the transactions." (Kennard v. Curran, 239 Ill. 122, 129.) And it was not necessary for complainants to prove that the execution issued on the deficiency decree had been served on Barry and Green and returned nulla bona as to them, before complainants filed their bill to set aside the conveyance in question. (Dillman v. Nadelhoffer, 162 Ill. 625, 628.)

For the reasons indicated, the decree of the Circuit Court should be affirmed and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

40 51a

210 - 29299

285 I.A. 610

RUDOLPH K. GYZE,
Plaintiff and Appellee,

vs.

HOMEMADE SAUSAGE COMPANY,
a corporation,
Defendant.

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H. M. SAUSAGE COMPANY (formerly
HOME MADE SAUSAGE COMPANY), a
corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 18, 1922, plaintiff commenced an action in the Municipal Court of Chicago against Homemade (one word) Sausage Company, a corporation, to recover the sum of $905 for "moneys had and received." On October 30th, the Home Made (two words) Sausage Company, a corporation, entered its special appearance by attorney, for the sole purpose of "pleading an abatement of said action, to-wit, a misnomer of this defendant," and filed such a plea, which the court struck from the files, and properly so, because it was not verified "by the affidavit of the person offering the same, or of some other person for him." (Sec. 1, Chap. 1, Cahill's Stat.; Life Association of America v. Fassett, 102 Ill. 315, 322.) On November 18th, the defendant (describing itself as "Home Made Sausage Company, * * sued as Homemade Sausage Company") filed an affidavit of merits, denying the indebtedness claimed and alleging that it had had no contractual relations with plaintiff and did not owe him anything. In August, 1923, the cause was tried without a jury, resulting in the court finding the issues in plaintiff's favor, assessing his damages at $900, and entering judgment for said amount against defendant.

The judgment order discloses that defendant prayed an appeal, which was allowed conditioned on the filing of a bond within 30 days, and the transcript discloses that in apt time the appeal bond of the "H. M. Sausage Company,(formerly Home Made Sausage Company, a corporation), as principal," and with sureties, was approved and filed. After the transcript of record had been filed in this appellate court, plaintiff moved to dismiss the appeal on the ground that the bond was not signed as principal by the party against whom the judgment was rendered, but the motion was denied.

On the trial, after evidence had been introduced to prove plaintiff's case, defendant introduced certain documents as exhibits, as having a bearing on its defense as stated in its affidavit of merits. These exhibits were practically the only evidence introduced in its behalf. Exhibit 2 is a certificate of the Secretary of State of Illinois, dated February 4, 1916, and with an accompanying paper, recorded with the Recorder of Cook County on February 5, 1916, certifying that the "Home Made Sausage Company" is a legally organized corporation. From said accompanying paper it appears that its principal office is at Chicago, and that Joseph Stupka and James Petnzak were subscribers to its stock and directors. Defendant's Exhibit 4 is a certificate of said Secretary of State, dated November 3, 1922, (about two weeks after the present action was commenced) and, with an accompanying paper, recorded with said recorder (Doc. No. 7706017) on November 6, 1922, certifying that the name of said "Home Made Sausage Company" had been legally changed to that of "H. M. Sausage Company." Defendant's Exhibit 5 is a certificate of said Secretary of State, also dated November 3, 1922, and, with an accompanying paper, recorded with said Recorder (Doc. No. 7,706,018) on November 6, 1922, certifying that the "Hommade Sausage Company" is a legally organized corporation. Said accompanying paper is a written statement signed

by Joseph Stupka, James Potuzak and four others, required to be made in the formation of a corporation for pecuniary profit under the act in force July 1, 1919. The statement is sworn to and acknowledged, and gives the location of the principal office of the proposed corporation in Chicago. The total authorized capital stock is stated to be "Common $125,000." The names of 23 persons are set forth as being subscribers to the stock, together with the several amounts of stock subscribed for and the several amounts paid in. Among these persons are said Joseph Stupka and James Potuzak, and also plaintiff and one Steson Rubenovitz. It is stated that plaintiff has subscribed for 17 shares ($1700) and has paid in only $5 on his subscription, and that said Rubenovitz has subscribed for 20 shares ($2000) and has paid in only $5. It is further stated that the "Home Made Sausage Co., an Illinois corporation" is a subscriber for 736 shares, or $73,600, all of which has been paid in; that its subscription was signed by said James Potuzak, its president; that of the authorized capital stock $80,971 has been paid in - $7,371 in cash and $73,600 in property; that said property consists of "all stock, factory equipment, delivery trucks, fixtures, office equipment, accounts receivable, tools, merchandise and personal property of every kind and nature belonging to said Home Made Sausage Company, * * together with real property" (describing it); and that said Joseph Stupka, James Potuzak and one other had been elected as directors of the corporation to act as such until the first annual meeting of the stockholders.

Plaintiff was a witness in his own behalf, and his testimony, corroborated in some particulars by that of S. S. Seipp, disclosed in substance the following facts: In July, 1923, he and Steson Rubenovitz were co-partners in business in Chicago and they had negotiations during that month with said Joseph Stupka, treasurer of the Home Made Sausage Company, concerning

the selling to the company of their business and good will, and transferring all tangible property, in consideration of receiving certain stock. The tangible property was worth about $1800, of which he owned one-half, or $900, and Rubanovitz the other half, and consisted of cooking vats, ice boxes, a Ford auto-truck, office supplies, furniture and fixtures. This property was turned over to the "Home Made" Company, and, at the time plaintiff gave $5 to Stupka and signed his said subscription. And Stupka gave plaintiff the following paper:

"Receipt No. 34.

Chicago, Ill. July 18, 1922.

Received of Rudolph K. Cyze Five ($5) Dollars in part payment for 17 shares of common stock of Homemade Sausage Company. This receipt is accepted by the person to whom given, his successors and assigns, subject to all of the terms, provisions and conditions of the subscription agreement under which it is issued and is exchangeable on surrender for engraved certificates of capital stock as when and if issued. Balance to be paid on demand.

Joseph Stupka, Agent.

Received of Rudolph K. Cyze, in part payment, $900 in fixtures, such as cooking vats, ice boxes, and a Ford Truck. Balance to be paid on demand.

Joseph Stupka."

Plaintiff further testified that in August, 1922, about one month after the above happenings, he called at the office of the "Home Made" Company, and demanded of Stupka his stock, or the return of the tangible property and fixtures or $900 in money; that Stupka refused to give him stock or return any property or give him any money; that in September, 1922, about a month thereafter, plaintiff, in company with his brother and said W. G. Seipp, again called on Stupka at said office in the endeavor to obtain some kind of a settlement, and asked him "if he would not settle with me, if he would not give me my stock or fixtures or something for my money;" that at first Stupka seemed inclined to make a settlement by returning a part of the property and wrote out a list thereof, but changed his

mind and said that he "would not give me anything and as much as told me to get out of his place of business;" and that no stock was tendered to him by Stupka or the Company, and no further interviews were had prior to the commencement of the present action.

James Petuzak, called by plaintiff as a witness under section 53 of the Municipal Court Act, testified that he was president of the "Home Made" Company; that its name was changed in November, 1920, "when we got through the reorganization;" that the new "Homemade" Company, of which he was also president, took over all of its property, including the "used stuff" which plaintiff had transferred to the "Home Made" Company; that prior to said transfer the "Home Made" Company had used the Ford truck and other property in its business, and that the "Homemade" Company was now using the truck, and such of the other property as had not been broken up; and that Joseph Stupka had been the manager of "Home Made" Company and was now the manager of the "Homemade" Company.

Defendant's counsel, while admitting that "there is a possibility of some confusion from the use of the names 'Home Made' and 'Homemade' sausage companies," contends that plaintiff cannot sustain his action against defendant, and that if he has any right of action against anyone it is against Joseph Stupka as "promoter". We cannot agree. The action for money had and received "applies not only to money, but to anything which is received as money" (Gordon v. Johnson, 186 Ill. 18, 31), and "lies where the defendant has received credit or other property, which is the equivalent of money, and for which in equity and good conscience he ought to pay." (Peterson v. Smith, 211 Ill. App. 431, 435.) Plaintiff delivered property and chattels worth $900, and at that agreed value, not to a "promoter," but to the then existing corporation, of which Stupka was the treasurer and

manager, in part payment for certain capital stock which he agreed to purchase. The corporation used the property in its business, refused to deliver any stock or to return any of the property or to pay any money to plaintiff, and afterwards transferred all of its property, including that property received from plaintiff, to a newly organized corporation of practically the same name and with the same president (Potuzak) and the same manager (Stupka). It will be noticed from Defendant's Exhibit 3 that plaintiff was not credited on his stock subscription in the proposed new corporation with the value of the property, or any part thereof, which he then transferred, and that all the property of the old corporation, including that transferred to it by plaintiff, was transferred to the new corporation in payment of the subscription of the old corporation to the stock of the new corporation. While it is true that the new corporation (defendant) was not completely organized until about two weeks after the plaintiff commenced the present action, still, after complete organization and with knowledge of the transaction, it accepted the benefits of the property transferred by plaintiff to the old corporation. Under all the circumstances disclosed we think that it should be held liable to plaintiff in this action to the extent of $900, as adjudged by the trial court. (Streator Telephone Co. v. Continental Construction Co., 217 Ill. 577, 580.) The fiction of the separate legal entity of the two corporations, strongly urged by defendant's counsel, should not be carried to such an extent as to amount to the perpetration of a fraud upon plaintiff. (Donovan v. Purtell, 216 Ill. 629, 639, quoting from Bank v. Trebein Co., 59 Ohio St. 316.)

The judgment of the Municipal Court should be affirmed, and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

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219 - 29308

235 I.A. 610

WILLIAM H. G. LOGAN,
Appellee,

vs.

HENRY DUSING,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 2, 1923, plaintiff commenced an action in contract in the Municipal Court of Chicago, against Henry Dusing, to recover a balance of $285, claimed to be due for certain medical services rendered Paul Dusing, son of defendant and about 38 years of age, during the fall of 1920. Plaintiff, in his second amended statement of claim alleged that the services were rendered at defendant's request and upon his promise to pay for the same. Defendant, while not disputing the performance or value of the services, denied that he made any oral promise at any time to pay for the services, and that such promise, if made, was void under the Statute of Frauds. The cause was tried before a jury, resulting in a verdict for $285 in favor of plaintiff. Judgment was entered against defendant in said sum and he appealed.

Plaintiff was not a witness on the trial. He called defendant as a witness under section 33 of the Municipal Court Act, and also Dr. F. G. Futerbough, a physician who had his office in the same suite as plaintiff. Defendant also testified as a witness in his own behalf and his testimony was corroborated in some particulars by that of Paul Dusing.

The court instructed the jury orally and defendant claims that certain portions of the charge were erroneous.

As no specific objections were made to the charge at the time, they cannot here be made. (Pecararo v. Malberg, 246 Ill. 95, 97; Vintalora v. Pappas, 310 Ill. 115, 117.)

The main point raised by defendant's counsel is that credit for the services was extended to Paul Dusing and not to defendant and no recovery can be had from the latter by reason of the Statute of Frauds.

The following facts in substance were disclosed upon the trial: In September, 1930, Paul Dusing met with an accident and his jaw was badly fractured. He was taken to a hospital and the attending physician requested plaintiff to call and examine the patient. Instead of going himself, plaintiff sent Dr. Puterbaugh and the latter made an examination and there treated the patient. About two days later the patient, accompanied by his father (defendant) and a friend, called at plaintiff's office and further treatment was administered then and on many subsequent days by Dr. Puterbaugh, who testified that all his services were rendered for and in behalf of plaintiff. Neither at the time of said call nor thereafter did defendant see plaintiff. At said time Paul Dusing requested defendant to make a payment on account for him (the son) of $100 out of funds which defendant had in bank. This money belonged to the son. Accordingly, defendant wrote out a check for $100 and handed it to Dr. Puterbaugh, who thereupon made out and signed a receipt for $100, "cash on account" for services rendered and handed it to Paul Dusing (the son). The receipt is on a printed form, in which appear the names of both plaintiff and Dr. Puterbaugh, is dated "Sept. 22, 1930" and is addressed to "Mr. Paul Dusing." Dr. Puterbaugh testified that when the check was given him defendant said in substance that he could make a payment of $100 then and would "take care of the rest later on." Both defendant and his son denied that defendant made at the time any such statement. The son further testified that after Dr.

Futerbaugh had completed the treatments he received statements from plaintiff of the balance due. Defendant testified that he never received any statements from plaintiff of the balance of $185, claimed to be due, although he did receive letters from certain attorneys.

Under the evidence we do not think that such a state of facts was shown as would avoid the statute of frauds. (27 Corpus Juris, p. 132, Sec. 20.) In Lusk v. Throop, 189 Ill. 127, 135, it is said: "Undoubtedly, where the question involved is whether the promise is original or collateral, the test is whether the credit is given to the person sought to be charged, or to some one else." The facts that the son was of mature years, that the receipt for the $100 was written out in his name and given to him, and that statements were afterwards sent to him of the balance claimed to be due, furnish strong evidence that credit was given to him, and that if any oral promise was made by defendant it was a collateral one. (Hardman v. Bradley, 85 Ill. 162.)

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

228 - 29317

235 I.A. 610

MOORHUFF J. PARKER,
Appellant,

vs.

STANDARD OIL COMPANY,
a corporation of Indiana,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant in the Municipal Court of Chicago to recover damages to his automobile occasioned by defendant's automobile colliding with it at or near the intersection of Van Buren Street and Custom House place in the city of Chicago on May 26, 1923. He claimed that the collision was caused by defendant's negligent operation of its automobile and that the front bumper of his automobile was so damaged as to require its replacement with a new one, costing him $28 at the then current market price. A jury, demanded by him, returned a verdict in his favor for $14, and judgment was entered against defendant in that sum.

Plaintiff appeals to this court, and contends that the verdict and judgment are inadequate, as he should have recovered $28, and that the verdict for $14 "cannot be reconciled with any theory based on the evidence." We cannot agree. Defendant's evidence was to the effect that the damaged bumper had been in use for about two years and could have been repaired and put in as good condition as it was at the time of the collision at a much less cost than $28. Under the evidence we think that the jury did substantial justice between the parties, and that the judgment should be affirmed, plaintiff to pay the costs in this court, and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

249 - 28907

CLARA C. KIRK and WILLIAM P. SIBLEY as Trustees Under the Last Will and Testament of James Alexander Kirk, Deceased,
Complainants,

vs.

GERTRUDE METZEROTT et al.,
Defendants.

JANET VIRGINIA KIRK, VAN GORDER KIRK, MERRITT KIRK RUDDOCK and BILLINGS KIRK RUDDOCK,
Appellants.

235 I.A. 611

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainants as trustees under the last will and testament of James Alexander Kirk, deceased, filed a bill seeking a construction of the will and a determination of the validity of the trust thereby created. Clara Kirk, one of the complainants, is the widow of James Kirk. The defendants are his widow individually, his children and his grandchildren. Two of the testator's children, Willing D. Kirk and Gertrude Metzerott, by their respective answers challenged the validity of that portion of the will creating a trust. The cause was heard on the bill, answers, and evidence in court and the Chancellor adjudged the portion of the will creating the trust to be invalid. From this decree the minor grandchildren have appealed to this court.

At the date of the testator's death the estate consisted of 5,004 shares of the James S. Kirk & Company, an Illinois corporation, and a small parcel of Illinois real estate, together with a residuary interest in the testator's Wisconsin real estate or its proceeds, in case of sale by the widow, who was given a life estate therein with power of sale. Prior to

the commencement of this suit the Illinois real estate was sold and conveyed by the trustees for $2,000, which was held by them in lieu of the real estate as part of the trust property. Also prior to the commencement of the suit, under power given by the will, the trustees distributed two-thirds of the principal of the trust property among the widow and children of the testator so that when the suit was commenced the trust estate consisted of the remaining one-third of the Kirk & Company stock, valued at approximately $500,000, and one-third of the proceeds of the sale of the Illinois real estate, amounting to $666.67, and the remainder in the proceeds of the Wisconsin real estate, which had been sold by the widow for $37,730.

Is the validity of the provisions of the will creating the trust to be determined by the laws of Wisconsin or of Illinois?

The testator resided in Wisconsin when he died, February 22, 1907, and his will was probated there; it has never been probated in Illinois. Clara Kirk, his widow, also a resident of Wisconsin, was named and acted as executrix. She and Charles S. Holt of Chicago were named as trustees and the Northern Trust Company of Chicago, an Illinois corporation, as successor in trust upon the death of both the others. In case of the death of only one of the trustees, the surviving trustee was given power of appointing a successor co-trustee by a writing to be recorded in the clerk's office of the Probate court where the will should be probated, such appointment to be approved by the judge of such Probate court, and such successor co-trustee was to serve with the surviving trustee until the death of the latter, whereupon the Northern Trust Company was to be the sole trustee. The widow and Mr. Holt accepted the trust, but on December 13, 1918, Mr. Holt died and William F. Sidley of Chicago was duly appointed successor co-trustee, and he accepted the trust. At this time the widow resided in Chicago,

having changed her residence from Wisconsin.

Under the Wisconsin statutes, which were duly proven, its county courts have jurisdiction over testamentary trusts, and letters of trust were duly issued pursuant to the Wisconsin law by the County court of Waukesha county, Wisconsin, which was the Probate court where the testator's will had been probated. Upon Mr. Kelt's death letters of trust were issued to William Sidley.

The Northern Trust Company, named as successor in trust, was not authorized to conduct a trust business in Wisconsin, and according to an opinion of the Attorney General of that state in 1910, it was not possible for this company to qualify in Wisconsin to do a trust business, assuming that the laws remained the same.

The certificates of stock of the James S. Kirk Company belonging to the estate have always been kept in Illinois, both before and after the testator's death, and the trustees' books of accounts have also been kept in this state.

Following the paragraphs of the will creating the trusts and giving the trustees full power over the trust estate are two sections which are pertinent to this controversy, viz:

"Two: Having entire confidence in the discretion and judgment of my said trustees, I direct that from time to time they apply and pay over by direct payment to the persons named or otherwise, so much of the income and principal of my estate, real and personal, as they may deem advisable for the support, maintenance, education and general advancement and welfare of my wife and my four children, to-wit: my daughter Gertrude, wife of John H. Metcrett, now of Washington, D. C.; my son, Willing D. Kirk; my daughter, Margaret Kirk, and my son, Alexander Comstock Kirk, in the proportion of one-third to my said wife and the remainder to my said children in equal shares; but the advancements of principal made to either of said persons shall not at any time exceed two-thirds of the amount which would come to them respectively if my estate were then to be divided in the proportion of one-third to my wife, and the remainder in equal shares to my surviving children. In any distribution of income or principal under any of the provisions of this will, the descendants of a deceased child of mine shall stand in the place of such child.

"Three: Upon the death of the last survivor of my wife and four children aforesaid and of the husbands of my daughters, any part of my estate, income or principal, which shall not have been previously paid over or applied as aforesaid, shall be di-

vided among the descendants of my children per stirpes, charging against each share amounts which may have been advanced as nearly as the same can be ascertained, and if any of the items are of such character that they cannot be exactly divided, then an approximate division shall be made by the trustees, whose decision with reference thereto shall be final. There shall also be charged against the share of my daughter Gertrude the amounts which may be due me upon notes or otherwise from her husband, John M. Metzkott, at the time of my death. Provided, however, that no descendant of any child shall receive the possession, custody and control of his or her distributive share before attaining the age of thirty (30) years, but until the attainment of such age such respective shares shall continue to be managed and controlled by the trustee or trustees, with power of expenditure, application and advancement as hereinabove expressed; except that in any case where the foregoing provision would lead to a postponement of distribution beyond twenty-one (21) years after my death, such distribution shall take place at the expiration of such period of twenty-one (21) years."

In Illinois ownership of property must vest in some one within the period of a life or lives in being and twenty-one years thereafter. Waldo v. Cummings, 45 Ill. 421; Owsley v. Harrison, 190 Ill. 235; French v. Calkins, 252 Ill. 243. The contestants assert that this rule against perpetuities is violated by the first part of section 3 of the will above quoted providing for the distribution of the remainder of the estate "upon the death of the last survivor of my wife and four children aforesaid and of the husbands of my daughters," since the husbands may not be lives in being at the testator's death. In Wisconsin there is no statutory or common law rule against perpetuities with respect to personal property. Dodge v. Williams, 46 Wis. 70; DeWolf v. Lawson, 61 Wis. 439; Becker v. Chester, 115 Wis. 90; Danforth v. Oshkosh, 119 Wis. 242.

We hold that the validity and construction of the provisions of the will creating the trust are to be determined by the laws of Wisconsin, the domicile of the testator, and that whether the will violates the Illinois rule against perpetuities or is indefinite and uncertain under our laws is of no controlling importance. The general rule supports the validity of a will made in harmony with the laws of a testator's domicile who must be presumed to have knowledge of such laws and have acted with reference thereto

in the distribution of his property.

> "The law of the testator's domicile determines all questions as to the will so far as personalty is concerned - the testator's capacity, the formality of executing and revoking, the legality of the dispositions, the construction and effect of the provision." Rood on Wills, sec. 409.

In the present case an exception to this general rule is claimed because one of the trustees and the successor, the Northern Trust Company, are residents of the state of Illinois. We find no support for this claim in any decided cases. Usually appointment of a trustee rests upon personal grounds, where the testator reposes special confidence and trust in an individual or corporation to whom he entrusts the management and distribution of his estate. Geographical considerations alone would rarely be considered.

In Wisconsin, where the will was probated, courts of probate have jurisdiction over testamentary trusts, which is not the case in Illinois, and it is almost a conclusive presumption that the testator, knowing the trust he created would be administered under the supervision of the Wisconsin court, intended to create a Wisconsin trust.

The fact that the personal property consists mostly of stock in the James S. Kirk Company, an Illinois corporation, and that it is kept in this state, does not affect the general rule. Shares of stock are a kind of personal property, the situs of which is not dependent upon the location of the lands and chattels of the corporation. They are essentially rights of contracts of a shareholder in the nature of <u>choses in action</u>. They are related to the person of the owner as if held by him at his domicile. <u>Hawley</u> v. <u>Malden</u>, 232 U. S. 1; <u>Union National Bank</u> v. <u>Syram</u>, 131 Ill. 92; <u>Greenleaf</u> v. <u>Board of Review</u>, 164 Ill. 326. After the payment of debts all personal property, including contract obligations held

by the testator, regardless of the residence of the debtor, is distributed according to the law of the domicile of the intestate. Cooper v. Beers, 143 Ill. 35. Other cases holding that the laws of the testator's domicile govern the distribution of shares of stock, are Lowndes v. Crook, 87 Ms. 478; Russell v. Rocker, 67 Conn. 34; In re Colburn's Estate, 173 N. W. 35; Miller's Estate v. Executrix of Miller's Estate, 90 Kansas, 819.

The main question presented has been passed upon in a number of well reasoned cases, notably Cross v. U. S. Trust Co., 131 N. Y. 330. There the testatrix, a resident of Rhode Island, bequeathed certain railroad bonds, physically in New York when she died, in trust to a New York corporation as trustee. Both the property and the trustee were thus situated in a state other than the home state of the testatrix. It was contended that the trust provision of the will was invalid as violating the New York rule against perpetuities, although valid under the laws of Rhode Island, the testatrix's domicile. After an exhaustive discussion, the court upheld the trust under the general rule above stated. Most of that opinion might be pertinently quoted, but we shall only refer to it as expressing our own views and conclusion upon the question before us. The same might also be said of the opinions in Dennert v. Osborn, 140 N. Y. 30; also McKenna's Estate, 12 Wkly. N. Cas. (Pa.) 94; Whitney v. Dodge, 105 Cal. 192; Ansenbaum v. Garrett, 57 N. J. Eq. 186; Lozier v. Lozier, 124 N. E. (Ohio) 167; Fellows v. Miner, 119 Mass. 541.

In a helpful article on Equitable Interests in Foreign Property, by Joseph H. Beale, Jr., 20 Harvard Law Review, 383, after consideration of a large number of decided cases the author summarizes his conclusions therefrom as follows:

"As to a trust of movables created by will, there is no doubt that its validity must be tested in the first instance by the law of the testator's domicile. If valid by that law, it will be recognized and enforced everywhere, though the trustee is domiciled at the time in another state which would hold the trust invalid, or subsequently removes there, though the beneficiaries live in such a state, or the property is there at the time the trust is created."

We are in accord with what is said in these opinions as to contracts contrary to public policy. Such contracts generally relate to matters tending to undermine public morals or to endanger public health or safety and contracts in restraint of trade and similar concerns. It is very doubtful if the wise and just distribution of one's property could be included in this category. It would be in conflict with principles of right to permit a testamentary disposition of personal property, valid by the law of the testator's domicile, to be annulled in any other state except for very grave reasons.

The cases cited by the contestants upon examination do not appear to be in point. Such cases are Hope v. Brewer, 136 New York, 126, and Chamberlain v. Chamberlain, 43 N. Y. 424. These involved the question whether a trust, invalid in the home state of the testator, could be valid with respect to property in a foreign state. That is wholly a different question from the one before us. In Ford v. Ford, 70 Wis., 19, it was held that the Wisconsin courts would not undertake to pass upon a devise of real estate outside of Wisconsin.

It is axiomatic that courts should, if reasonably possible, adopt the construction of a will that will give effect to the intention of a testator. Meisen v. Ellis, 247 Ill., 418.

Extensive arguments have been presented touching the construction of the trust provisions of the will and the proper administration of the estate. It would be inconsistent with the views above expressed for us to pass on these matters which could be presented to the Wisconsin court which has jurisdiction of, and has

undertakes under its laws to supervise, the administration of this trust.

For the reason that we are of the opinion that the trust is a Wisconsin trust to be administered there under the laws of that state, the decree of the lower court is reversed and the cause is remanded for further proceedings consistent with what we have said.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

250 - 28908

4050

CLARA C. KIRK and WILLIAM P. SIDLEY, as Trustees under the Last Will and Testament of JAMES ALEXANDER KIRK, Deceased,
Complainants,

vs.

GERTRUDE MATZEROTT et al.,
Defendants.

CLARA C. KIRK, Individually,
Appellant.

235 I.A. 611

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a branch of the litigation which we have discussed in an opinion filed this day in case No. 28907.

The Chancellor of the Superior court, after holding the will of James A.Kirk, deceased, invalid in so far as it sought to establish a trust and that said trust estate was intestate property, applied the Wisconsin law of descent and ordered the distribution of the estate in equal shares to the widow and children of the testator. From this order Clara C. Kirk individually appeals and this appeal has been consolidated for hearing with the appeal in case No.28907.

Appellant contends that the court erred in applying the Wisconsin law of descent in the distribution of the property and that resort should have been had to the Illinois law in determining to whom and in what proportions the estate should go.

This order was predicated upon the conclusion of the Chancellor that the provisions of the will under discussion were invalid. As we have held in the opinion in case No. 28907 that the trust does not violate the Wisconsin law, which controls, it follows that the law regulating the distribution of intestate property is not applicable.

The order appealed from is reversed and the cause is remanded for further proceedings consistent herewith.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

28 - 29097

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MILTON SCHMALZ,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant Schmalz, charged with wilful and malicious assault with a deadly weapon, an automobile, upon Margaret McCarthy, was found guilty by the trial Judge and sentenced to thirty days imprisonment in the county jail and fined $100. The case comes to this court with a stipulation as to the facts.

July 3, 1923, about nine-thirty p. m., defendant was riding along in his automobile north in the easterly street car track in Kedzie avenue, which runs north and south in Chicago. As he crossed Walnut street going about ten miles an hour and approached Fulton, east and west bound streets, he saw Margaret McCarthy about fifty feet away, standing on the easterly street car track in Kedzie avenue. He at once turned his car into the roadway east of the track with the intention of passing her on the east, but she then stepped eastward into this roadway into the path of the machine. From this defendant concluded that she was returning to the sidewalk to await a northbound street car, and he turned his car westward back into the car track, when, in passing the woman, who was still standing in the roadway east of the track, the guard on the right side of his automobile caught her clothing and she was thrown to the ground. Defendant stopped his machine at once right beside the woman. A bystander

came to her assistance, helping her to arise, and suggested that if she were injured she had better go to a hospital, but she refused to do this and said she wished to go to her home. She gave her name and said that her husband was a police officer at a nearby station. Her husband was called by telephone and came and took her home. A physician was called to give her first aid, but he did not render any. Defendant remained at the scene of the accident and inquired of some woman who had been talking with Mrs. McCarthy, and was told that she was not hurt much but was frightened. He gave his license number and his name and address, and the next day, pursuant to a telephone message, he called at McCarthy's home and found Mrs. McCarthy in bed with a bandaged head. Defendant gave both Mr. and Mrs. McCarthy all desired information, with the name of the insurance company with which he was insured. He visited the home of the McCarthy's four or five times after this, but never saw Mrs. McCarthy and was informed that she was visiting neighbors or was shopping. Defendant later interviewed Mr. McCarthy, who asked defendant if he could raise $1,000. August 3rd, a month after the accident, defendant was arrested and charged with an assault with a deadly weapon.

This judgment cannot stand. The agreed statement of facts clearly shows that there was an accident, which may or may not have been occasioned by the negligence of defendant, but that the intent to injure, an essential ingredient in a prosecution of this sort, is wholly lacking. While it is true that where the conduct of the driver is so reckless, wanton and wilful as to show a total disregard of the safety of pedestrians, a conviction for assault is warranted, a conviction will not follow an accident caused by mere negligence less than such reckless conduct. People v. Anderson, 310 Ill., 349. Here the defendant was evidently attempting to

avoid striking the woman. The change of direction of the machine, first to the east and then to the west, indicates a certain degree of care on defendant's part and certainly negatives any wanton and wilful disregard of the consequences to Mrs. McCarthy.

Applying the well established rules of law to the admitted facts, the judgment is reversed.

REVERSED.

Matchett and Johnston, JJ., concur.

43 - 29123

40 S/a

235 I.A. 611

LAZURS LEVIN,
Appellee,

vs.

FORT DEARBORN CASUALTY UNDERWRITERS, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for a loss by fire to his automobile on an insurance policy issued by defendant. It was agreed that the loss amounted to $385, and upon trial by the court plaintiff had judgment for this amount. Plaintiff received the insurance policy issued by defendant from D. Koenigsberg, an insurance broker, to whom plaintiff paid the premium.

The only point presented by defendant for a reversal is predicated upon the assumption that Koenigsberg was not the agent for the defendant, the Insurance company, but of the plaintiff. The record does not sustain this contention. Koenigsberg, a witness for the defendant, testified that he received the premium money from plaintiff and that this was turned over to the defendant company; that in a settlement with the defendant of some other matters in which he had represented the Insurance company, the amount of the premium paid by plaintiff was taken into account.

The record clearly shows that Koenigsberg acted in this matter for the defendant company, which received the benefit of the premium paid by plaintiff. The judgment was proper and is affirmed.

Plaintiff moves that he be allowed damages on the ground that the appeal has been prosecuted for delay and also for his costs of the additional abstract filed by him. Both motions will be allowed, and the judgment is affirmed with damages to

plaintiff of $35.00 for the delay and the costs of the additional abstract will be taxed against the defendant.

AFFIRMED WITH DAMAGES OF
THIRTY-FIVE DOLLARS.

Matchett and Johnston, JJ., concur.

85 - 25130

4058

235 I.A. 612

JOHN ROESING,
Appellee,

vs.

E. P. MOELLER, Doing Business as the Mayfield Garage,
Appellant.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McGOREELY DELIVERED THE OPINION OF THE COURT.

Plaintiff kept his automobile in defendant's garage, paying $18 a month rental. The night man in charge of the garage was Sol Williams, who on the evening of June 30, 1921, or early morning of July 1st, without the knowledge or consent of either plaintiff or defendant Moeller, took plaintiff's automobile out for a drive on his own account and had an accident in which the car was damaged. Plaintiff brought suit to recover the amount of his damages and upon trial by the court had judgment for $723.63, from which defendant appeals.

Defendant asks for a reversal upon the general rule that where a bailment is for mutual benefit the bailee is held only to the exercise of ordinary care in relation to the subject matter and is responsible only for negligence and not responsible for the wrongful acts of his servants done without his knowledge and outside of the master's business, but to accomplish some end personal to the servant himself.

This court has had recent occasion to consider this identical point under circumstances essentially similar to those in the present record. The case is Evans v. Williams et al., No. 28514, opinion filed by us March 10, 1924. We there gave consideration to the numerous decided cases touching this point, and

held that under the circumstances presented the bailee was liable. Considering the points and argument made by the defendant in the present case and giving reconsideration to the question involved, we still adhere to our opinion as expressed in Evans v. Williams, supra. We held that the trial court correctly applied the law and that the judgment was proper, and it is therefore affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

68 - 29155

235 I.A. 612

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ARTHUR SPINGOLA, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with being a keeper of a house of prostitution in Chicago and upon trial by the court was found guilty in manner and form as charged in the information. However, in entering the judgment a clerical error was made in describing defendant as guilty of being "an inmate" of a house of prostitution, etc.

No bill of exceptions is before us, but defendant asserts that there is a fatal variance between the judgment and the information. There is obviously a variance which can be corrected in the trial court, and that such is the proper practice has been held in many cases, including People v. Moor, 262 Ill. 152; People v. Dubin, 213 Ill. App. 341.

The judgment herein will be reversed and the cause remanded to the Municipal court of Chicago with leave to the State's Attorney to move for and directions to the court to enter a proper judgment on the finding.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett and Johnston, JJ., concur.

82 - 29169

235 I.A. 612

EDWARD REISMAN, Appellee, vs. FORT DEARBORN CASUALTY UNDERWRITERS, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant asks the reversal of a judgment for $815 had by plaintiff in a trial by the court in an action to recover for loss by theft of an automobile covered by an insurance policy issued by defendant.

The fact of theft is questioned, defendant suggesting that the automobile was collusively taken by Grover Mudge, who was boarding with plaintiff. While Mudge occasionally used the car, it can reasonably be inferred that on the morning of August 9, 1922, he returned it to plaintiff's garage and left the key to the garage with plaintiff's wife. Later when plaintiff went to the garage to get the car it was gone. The next day this was reported to defendant. About two months after the disappearance of the car Mudge and his wife left plaintiff's house and at the time of the trial no one seemed to know where he was. Although Mudge was available for several weeks and took part in conversations relating to the loss of the automobile, there seems to have been no suggestion that he took it in collusion with plaintiff until the trial. We hold that it was sufficiently proven that the car was stolen on August 9, after it had been returned by Mudge to plaintiff's garage.

Mrs. Reisman, plaintiff's wife, over objection was

permitted to testify that Mudge returned the key of the garage to her. In receiving the key she was acting as the agent of her husband and was therefore a competent witness to this fact. This was also proven by the testimony of plaintiff that he saw the key in its usual place on the hook and after the car was stolen gave it to the representative of the defendant company.

The automobile was equipped with a Decker wheel lock which prevented the operation of the car when the key was out of the lock and complied with the requirements of the policy. There was no claim at the trial that this device was not sufficient.

The amount of the judgment is questioned. There is no evidence to contradict plaintiff's testimony that he paid $825.12 for the automobile in December, 1921, about seven months before it was stolen. The policy was written for $850, with defendant's knowledge as to the character of the car, its value, and what plaintiff paid for it. While the question of the actual value of the car is not free from doubt, yet the amount of the judgment is within the scope of the testimony.

Defendant claims the benefit of a provision of the policy that in the event of loss there should be deducted from the claim $50. But plaintiff's suggestion is sound, that this provision for a $50 deduction was conditioned upon an adjustment between the parties, and that no adjustment was made. Repeated efforts were made by plaintiff's attorney to secure a settlement, and defendant at one time promised to adjust the matter. The amount of the loss was never discussed. Failing to secure satisfaction, suit was brought more than five months after the loss of the car.

We do not find any sufficient reason for reversal and the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

94 - 29181

4061

235 I.A. 612

CATHERINE YORK,
(Complainant) Appellee,

vs.

ALBERT T. FARR, MARY FARR and GREENEBAUM SONS' BANK & TRUST COMPANY, (Defendants).
On Appeal of ALBERT T. FARR, (Defendant),
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit court finding defendant, Albert T. Farr, guilty of contempt of court, imposing a fine of $200, and in default of payment to be imprisoned in the Cook County jail.

June 9, 1925, Catherine York, the complainant, filed her petition asking among other things that certain instruments conveying the property described in the bill be set aside and declared null and void, and for an injunction and other relief.

June 11th an injunctional order was issued commanding Mary Farr and Albert Farr, her husband, and their attorneys and agents to refrain from disposing of the property in question or in any manner disposing of or transferring the proceeds of said property at any time.

July 23rd one of the attorneys for complainant filed a petition signed and sworn to by him, alleging on information and belief that Albert Farr and Mary Farr had destroyed the one-story and a half building located on the premises and that it had been torn down and removed from the real estate subsequent to the date of the injunctional order, and asked that defendants be compelled to show cause why they should not be held for contempt of court

for failure to comply with the writ. Defendants filed their answer under oath denying the violation of the injunction and alleging that the frame building upon the premises had been vacant, unoccupied and practically a total wreck, and that before suit was commenced they sold it to a wrecking company for ten dollars for the purpose of having it wrecked, and that this company wrecked the building and removed the same, and that defendants had nothing whatever to do with the wrecking thereof.

October 10th the court, after reading the affidavit filed on behalf of the complainant and hearing the testimony of witnesses and considering the answer filed by defendants, found that Albert T. Farr "is guilty of violation of said writ of injunction."

A number of sufficient reasons for the reversal of this order have been presented, but it is necessary to notice only one. The evidence heard by the court is not preserved by a bill of exceptions, and there is no recital in the decree of facts upon which the court based its findings. In chancery cases it is the well settled practice that the parties in whose favor a decree granting relief is entered, to maintain it must preserve the evidence by a certificate or the decree must find the specific facts proven on the hearing. Village of Harlem v. Suburban R. R. Co., 202 Ill. 301; Day v. Davis, 213 Ill. 53.

This seems to be conceded, but the complainant invokes the rule that where the facts sufficiently appear by admissions in the answer, no other recital of facts is necessary. By their answer defendants asserted that some time before the bill was filed the house in question was vacant and defendants were unable to rent it; that it was not in a rentable condition; that mischievous boys in the neighborhood had practically wrecked the building, stolen all the plumbing, stairway railings and [illegible]

the building; that the police authorities in Chicago complained to defendants with reference to the condition of the building, and that they thereupon decided it was best to wreck it entirely; that defendants requested bids from various wrecking firms and the best received was from the Illinois Wrecking and Lumber Co., which offered defendants ten dollars for the building, agreeing to remove it from the premises, and that defendants contracted with this company upon this basis, which contract was entered into prior to the filing of the bill of complaint herein; that the wrecking company paid defendants ten dollars prior to the commencement of these proceedings and proceeded to carry out its contract by wrecking and removing the building, which was almost worthless and of no value to anyone; that after the commencement of the suit defendants had nothing whatever to do with the wrecking of the building, which was done pursuant to the prior contract made in good faith with the wrecking company; that the lot is worth more vacant than with the building. Defendants further aver that they have done nothing since the issuance of the injunction which was in violation thereof, and have done no act of any kind or description which could be termed a violation of the injunction; they disavow any intention to commit a contempt of the court.

Taking these allegations as true, which we must, there were no facts constituting a contempt. The injunctional order could have no retroactive affect upon the contract made in good faith prior to the commencement of the proceedings. The writ could only operate upon the conduct of the defendants from and after its date, and the answer denies categorically any conduct during the life of the writ which was in violation thereof. As no other facts appear, the record before us does not justify the order of contempt and it is reversed.

REVERSED.

Matchett and Johnston, JJ., concur.

103 - 29191

406

235 I.A. 613

PATRICK COLEMAN,
Appellee,

vs.

FRANK FIRSHING,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck by an automobile belonging to defendant, receiving injuries. He brought suit and upon trial had a verdict for $2,000. From the judgment thereon defendant appeals.

Liability is admitted and the only question presented to us is the amount of the verdict, which defendant claims is so excessive as to show that the jury acted from prejudice.

Plaintiff's testimony was that when he was knocked down he was stunned for a time and had a pain in the ribs in the left side; that he was bandaged by a Dr. McGrory to whose office he was taken, but that after he reached home he grew worse and called in a neighboring physician, Dr. Holloway; that he had difficulty in breathing that night and the next day and could not straighten up on the left side; that if he tried to stand up it would feel in his side as if he were being struck with a knife, and he would feel pain all over his body; that he never knew what it was to be sick before the accident and that he had no pleurisy or trouble with his lungs. The doctor treated the patient for seven or eight weeks, bandaged his body around the ribs, also giving him medicines internally. Defendant had pain in his chest and passed blood through his mouth on three occasions, also spit up blood on the

night of the accident and once after resuming work; that previous to the injury he had been employed as a moulder in a machine shop and with another man had carried pots of metal weighing 250 pounds; that since the injury he had not been able to do that kind of work. He now grinds castings "weighing about one and one-half pounds," while seated; that he had sharp pains all over his body for about nine months; that at night when he lies down the pain pinches him; that he had not been able to do any other kind of work since the accident and that his wages are three dollars a week less than they had been prior to the injury.

Dr. Holloway, who apparently is a competent physician of considerable experience, testified that on the evening of the accident he found plaintiff with two fractured ribs on the left side; that he felt and heard a crepitus confirming the fracture; that plaintiff had acute pleurisy brought about by the fractured ribs.

The testimony of a bystander who saw the accident indicated that the blow received by plaintiff from the automobile was less in force than as plaintiff described it. Dr. McGrory testified that upon examination shortly after the accident he found no evidence of injury on plaintiff's body, and that while he applied a bandage and adhesive tape he did this for the mental effect on the patient.

These variant stories of the respective physicians were properly presented to the jury, which could observe the witnesses and their conduct and demeanor on the witness stand. Evidently greater credence was given to the evidence of Dr. Holloway, which tended to corroborate the symptoms as related by plaintiff, and we cannot say this was clearly improper.

Suggestions are made in argument concerning errors upon

the trial, but no point touching them is made in the points briefed.

No sufficient ground appears for holding that the verdict is so excessive as to justify this court in setting it aside.

AFFIRMED.

Matchett and Johnston, JJ., concur.

120 - 29208

H063

235 I.A. 613

NELLIE A. McGINNIS,
Appellant,

vs.

MAE L. MIGRDAN,
Appellee.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an adverse judgment entered upon the verdict of a jury in an action to recover $500 alleged to have been obtained by the defendant from plaintiff through fraud and misrepresentation in a real estate transaction.

The substance of plaintiff's claim is that desiring to purchase a piece of improved property, number 6827 Harper avenue in Chicago, she was informed by the defendant, acting on behalf of the owners, that the price was $20,000, and that plaintiff agreed to buy it at this price and pay to the defendant for her services in assisting in securing the property the difference between said $20,000 and whatever less sum defendant might induce the owners to accept; that subsequently the owners contracted to sell to plaintiff for $19,500, and the deal was closed on this basis and plaintiff paid to defendant $500 as she had agreed. About a year and a half thereafter this suit was brought, plaintiff now alleging that at the time defendant quoted the price of $20,000 she knew that the actual price which the owners were willing to accept was $19,500, and that by concealing this from plaintiff and misrepresenting the selling price as $20,000 she obtained from plaintiff $500, which is the subject matter of this suit.

Plaintiff and defendant have been life time friends, and there is some ground to support the suggestion of defendant's

attorneys that the real cause of this law suit is some difference between the parties occurring subsequent to and apart from this real estate transaction.

After considering the variant stories the jury could properly believe that plaintiff asked defendant to assist her in finding some desirable property for her to purchase, and that defendant gave a considerable amount of time and services to this end. While investigating various properties prior to October 28, 1921, she met Harry J. Kiefer, at that time a real estate salesman for James Maloely & Company. Kiefer gave her the data as to the Harper avenue property, and he testified that he quoted to defendant a price of $19,500. Contradicting this defendant says that the price he quoted her was $20,000. At that time he gave defendant information as to the leases of the building, their terms and times of expiring; but it appears that Kiefer was in error as to the leases both as to rentals and terms. The jury could note this inaccuracy on his part, and having observed the demeanor of both witnesses on the stand could properly accept the testimony of defendant as to the price quoted. Defendant then showed plaintiff the building, quoting the price of $20,000. Plaintiff then said that she wished to buy the building, and it was suggested by defendant that the two of them go to Maloely's office, but plaintiff said she could not go and requested defendant to go and attempt to get the price reduced, offering to give defendant the difference. Defendant then had a conference with Kiefer and urged him to get the price down to $19,500, and three days later the contract was brought to defendant with this reduced price and it was signed. Plaintiff testified that she considered the building "a good buy at $20,000." From these and other circumstances and testimony in the case the jury could properly conclude that plaintiff paid no more for the property than she was willing to pay; that the payment to defendant

of $500 was pursuant to the agreement between the parties and that defendant at no time misrepresented or concealed from plaintiff anything with reference to the price which the owners and their agents were asking for the property.

A large number of citations and voluminous arguments have been presented touching dual agency. Some time after the transaction was closed, Maloney & Company gave to defendant $141.67, whether as commissions or a gratuity for effecting the sale does not clearly appear. It does appear that in the negotiations leading to the consummation of the sale defendant represented plaintiff and opposed some of the requests and demands made by Maloney & Company which defendant deemed against plaintiff's interests. One circumstance was where the agents of the owner attempted to charge plaintiff $60 to have an abstract examined. Defendant went to the Chicago Title & Trust Co. and found there was a guaranty policy and refused to allow plaintiff to be charged with the cost of this examination. All the way through defendant loyally represented plaintiff and we find nothing in her conduct which would tend to vitiate the agreement between her and plaintiff as to her compensation. She at no time did anything inconsistent with the rights and interests of plaintiff. Sherr v. Millard, 68 Ill., 392; Lex v. Ware, 238 Ill., 360.

When defendant procured for plaintiff a property which plaintiff was willing to buy at the price quoted, defendant had done all that she was employed to do. The suggestion to attempt to secure a lower price did not affect plaintiff's desire to buy the property, but was merely a method whereby the compensation for defendant's services might be covered by the price plaintiff was willing to pay. What may have happened subsequent to the execution of this agreement is no concern of plaintiff's. An agent cannot be required to account for a mere gratuity although received from

another person and as an incident of the agency. 2 Corpus Juris, 700; Gay v. Paige, 150 Mich. 463.

It has been held even the fraudulent representations by an agent by which the benefit he is to receive by a contract already executed is enhanced, do not vitiate the entire contract, and the rights of the parties will be determined by the original contract. Male v. Male, 301 Ill., 131.

We have considered the various other points presented but do not deem them of sufficient importance to justify a reversal.

The instructions are criticized at some length but counsel made no objection at the time they were given and cannot be permitted to urge in this court that which was not urged in the trial court. Frink v. Amstadt et al., 201 Ill. App. 418; Stoddard v. Ill. Imp. Co., 195 Ill. App. 471. Furthermore, plaintiff's brief does not set forth the instructions complained of but refers to them only by number. This is not the proper manner to present to this court instructions which are thought to be erroneous.

The crucial question is one of fact and this depends upon the credibility of the respective witnesses. We cannot say that the verdict of the jury accepting defendant's version is manifestly against the weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

132 - 29221

4064

JOSEPH GASZKA,
Appellee,

vs.

ANTON SHIMOS,
Appellant.

235 I.A. 613

APPEAL FROM CIRCUIT COURT OF

COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order denying a motion in the nature of a writ of error coram nobis to set aside and vacate a judgment of $5,000 entered against defendant on an order of default for failure to enter an appearance and the verdict of a jury.

Plaintiff, Gaszka, brought an action of trespass on the case in the Circuit court of Cook County against Anton Shimos, defendant, returnable to the August 1922 term of court. Summons was issued and on July 20, 1922, duly served on defendant. A declaration was filed September 7th charging defendant with alienating the affections of plaintiff's wife. Defendant filed no appearance and January 25, 1923, was defaulted for failure to appear. February 16, 1923, on a hearing by a jury a verdict and judgment were for plaintiff and against defendant for $5,000. Execution was subsequently issued and returned "no part satisfied." June 7, 1923, several terms after the term of the court at which judgment was entered, defendant filed his written motion under section 89 of the Practice act, supported by affidavits, and upon hearing in September, 1923, the motion was overruled.

The affidavit of defendant in substance alleges that he had no notice or knowledge of the entry of the judgment until March 21, 1923, when a writ of execution was served upon him; that March

23 he consulted his attorney and turned the matter over to him for attention; that plaintiff in April, 1922, had been employed as porter in defendant's place of business; that he was arrested charged with larceny and that defendant loaned plaintiff $100 for the purpose of making restitution to the complaining witness, and the charge of larceny against plaintiff was dismissed; that shortly thereafter defendant requested plaintiff to repay the $100 so loaned him but plaintiff refused and defendant discharged him from his employ; that immediately after defendant was served with summons in this action plaintiff advised defendant that if defendant did not insist upon the repayment of the $100 he would not prosecute the suit, and told defendant that he did not need to pay any attention to the suit, and that at divers times after the service of summons on defendant, "the plaintiff, his agents and friends, advised the defendant and represented to him that everything was all right and that he need not worry about the matter as the suit would be dropped;" that in August, 1922, plaintiff left the state and defendant has been unable to find him; that because of these statements by plaintiff and his agents, defendant consulted no attorney and filed no appearance and took no steps to defend the suit until after the service of the writ of execution on him on March 28, 1923. Defendant also denied the charges contained in the declaration filed.

Errors of fact which can be reached by this motion must be of such a nature as would conclusively have prevented entry of judgment. Gould Estate v. Watson, 80 Ill. App. 543. And errors of fact may include duress or an excusable mistake. Tagetti Brewing Co. v. Koehler, 200 Ill. 369. But the motion is not intended to relieve a party from the consequences of his own negligence. Cramer v. Illinois Commercial Men's Assoc., 260 Ill. 516. Absence of appearance by claimant and misunderstandings on

the part of attorneys for administrators which occasion their failure to be present at the time cause is called for trial, are not errors of fact within this section. Weller & Sons v. Berry, 207 Ill. App. 165.

The substance of defendant's affidavit is that he was misled by plaintiff's statement that he, the defendant, "need not worry about the matter as the suit would be dropped." We are referred to no case holding that such a statement would justify a defendant in wholly failing to take any steps towards defending a suit. In Fry v. Amer. Ins. Co., 155 Ill. App. 384, the record shows that the cause had been settled by the payment of money and a stipulation duly signed to that effect. It would tend to disrupt all rules of practice if the defendant could ignore a summons and at a remote subsequent term of court have a judgment set aside by merely making an affidavit that the plaintiff had told defendant that he need not worry as the suit would not be prosecuted. Regardless of what plaintiff had said, it was the duty of defendant to respond to the summons to appear in court and to take proper steps to defend the action brought against him. To rely, as defendant asserts he did, upon the mere promise of such an irresponsible and untruthful individual as defendant's affidavit discloses plaintiff to have been, and which was known to defendant, was clearly inexcusable negligence.

The order of the court denying the motion was proper and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

193 - 29282

H06a

235 I.A. 613

MOSES LEVITAN,
Appellee,

vs.

M. G. WOLF,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment in a forcible detainer suit tried by the court. Plaintiff does not appear in this court.

On the trial plaintiff introduced what purported to be a warranty deed conveying the premises to him, also evidence that a notice was served upon defendant demanding immediate possession of the premises, which notice was served upon defendant in his office, which is not at the premises in question. Also notice was served upon "a woman" upon the premises.

The action of forcible entry and detainer is a statutory proceeding and cannot be maintained except under the conditions named in the statute. Section 2, chapter 47, Illinois statute. There was no evidence as to the existence of any of the conditions named therein.

Neither was there any evidence that defendant was in possession of the premises when suit was commenced. This is an essential condition to the maintenance of such an action. McCluskey v. Nelson, 179 Ill. App. 182; Godair's Estate v. Case, 220 Ill.App.348.

As plaintiff failed to make a case the judgment is reversed.

REVERSED.

Matchett and Johnston, JJ., concur.

230 - 29319

406a

CONDE-NAST CO., INC., a Corporation, trading as THE NAST PUBLICATIONS,
Appellee,

vs.

DUNN'S COMMERCIAL SERVICE, a Corporation,
Appellant.

235 I.A. 613

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $693 entered on a verdict for that amount against defendant.

The suit was brought upon a written contract, whereby in consideration of $100 paid by plaintiff to defendant, defendant agreed to furnish its services in collecting plaintiff's accounts for a period of one year, plaintiff agreeing to use the service according to certain instructions in the contract. The basis of plaintiff's claim is upon the following guarantee:

> "Dunn's Commercial Service guarantees to pay to the above named subscriber in cash, within one year from date, any deficiency between the amount actually collected through the use of this service and Seven Times the amount paid for this service by Subscriber."

Plaintiff alleged in its statement of claim that it had paid defendant $100 as provided in the contract and had turned over for collection certain listed accounts; that it followed in all respects the instructions of defendants, and that notwithstanding the year for service had long expired defendant had failed to make collections, except seven dollars, whereby defendant became obligated under its guarantee to pay seven times the amount paid for the services, less the said seven dollars, namely, $693.

The undertaking of defendant under its guarantee was an original undertaking. Similar contracts have been construed in

Frile v. Cons. Adjustment Co., 180 Ill. App. 287; Baltimore Trust Co. v. Cons. Adjustment Co., 190 Ill. App. 30, and judgments on such guarantees have been affirmed.

Defendant asserts that plaintiff failed to prove on the trial that it complied with the instructions, as it was bound to do. Defendant's brief does not point out in what respects plaintiff's evidence failed to show this. It merely submits the assertion in general terms "without particularizing." Defendant has misconceived the situation in this court. Plaintiff introduced evidence with considerable detail, showing what it had done in attempting to comply with the instructions. The jury found that plaintiff proved that it followed the instructions. The presumption on appeal is that the verdict was justified in this respect and will stand unless the party appealing can with particularity show to this court wherein it was not in accord with the evidence. Nothing is presented which would justify us in holding that the plaintiff did not prove that it in good faith followed the required instructions and performed its part of the contract.

The second point made is that the court erred in admitting improper evidence. Again the objection does not particularize. It seems to be based upon the assertion that certain documentary evidence were not original documents. We are in doubt as to what documents are referred to. The objection seems to be directed to two exhibits, but the nature of these is not stated. From what is presented in the brief we cannot know whether or not these are secondary evidence. The testimony of Mr. Boslet, plaintiff's credit manager, would indicate that these exhibits were not secondary. Plaintiff's evidence was by depositions and objections should have been made when they were taken, or a motion made to suppress them before the trial, so that better evidence, if any, might be obtained. I. C. R. R. Co. v. Foulks, 191 Ill., 57.

The third point is that it was error to permit plaintiff to examine Jacob Shapiro, under section 33 of the Municipal Court act. Shapiro testified that he was the manager of defendant's commercial service. He therefore comes clearly under section 33, which permits an examination of the "managing agent of any corporation which is a party to the record in such suit."

The fourth point is that the arguments by plaintiff's counsel were prejudicial; but we are not told what counsel said and so cannot pass upon this point.

Defendant's brief complains of a number of matters without informing us as to facts. We are merely referred generally to the record. We will not search the record for grounds for a reversal. When the reviewing court is asked to set aside a judgment founded upon a verdict, it will do so only where it is clearly and manifestly made to appear that the verdict is contrary to the weight of the evidence, or that there has been prejudicial error committed upon the trial. Mere general complaints and statements as to the evidence and rulings of the court are not sufficient.

As no sufficient reason is presented for reversal, the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

245 - 39334

235 I.A. 614

JOSEPH J. BOFIN,
Appellee,

vs.

CLARENCE W. SHAEFFER and
A. M. SCHUENEMANN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant Schuenemann from an adverse judgment rendered in a replevin suit tried by the court. The property in controversy was an automobile and plaintiff was held to be entitled to possession and to have judgment of one cent for damages against defendant Schuenemann. Defendant Shaeffer was the temporary custodian of the car and did not appear in the case.

For about eighteen months prior to the occurrence giving rise to this controversy plaintiff was a salesman in the employ of the Schuenemann Motor Sales, under which name defendant A. M. Schuenemann dealt in automobiles in Chicago. Plaintiff testified that he had as compensation a drawing account of fifty dollars a week and a commission of five per cent on all cars sold by him. August 23, 1923, plaintiff and Schuenemann had a conversation with reference to the purchase by plaintiff of an automobile. There is a dispute as to part of the terms of sale. It is not disputed that the price of the car was $1260, and that plaintiff was to pay $290 cash. This cash payment was made and accepted. Plaintiff says the balance of the purchase price was to be paid by the cancellation of accrued commissions on sales of cars then due from Schuenemann to him. Defendant testifies, on the contrary, that the balance of the purchase price was to be secured by the transfer of a chattel mortgage from another car owned by

Schuenemann onto the new car purchased by plaintiff; that the car was delivered to plaintiff on this understanding and that defendant went out of town for a week and left his son, E. A. Schuenemann, in charge, who on request from plaintiff and upon plaintiff's assurance that the transfer of the chattel mortgage had been made, gave him a bill of sale conveying the automobile to him. Plaintiff denies that there was any agreement with reference to a chattel mortgage.

The determination of the facts as to the terms of the purchase depends upon the credibility of the witnesses. The trial court saw them and heard them testify, and we cannot say that his conclusion to accept plaintiff's version was not justified. One consideration tending to support plaintiff's story is that although plaintiff continued to work for Schuenemann and continuously used the car, it was not until about a month thereafter that Schuenemann attempted to get possession of it.

The judgment was proper for the reason that defendant was entitled to possession of the automobile, if at all, upon the ground only of fraud on the part of plaintiff with reference to the contract of sale and a consequent rescission of the same by defendant. But defendant does not claim that the contract of sale was rescinded. He has kept the $290 paid in cash and does not offer to return it. He cannot affirm the contract in part and rescind in part. If he elects to rescind he must put the plaintiff in the same position he was before the sale was made. He can not have both the cash payment and the automobile. Jennings v. Gage, 113 Ill. 611; Higdon v. Walcott, 141 Ill. 541.

We see no sufficient reason to reverse the judgment, and it is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

270 - 29359

AGATHA TOM,
Appellee,

vs.

EARL DE YOUNG,
Appellant.

235 I.A. 614

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit alleging that defendant broke his promise to marry her, from which she suffered damages, upon trial had a verdict and judgment for $2,000.

Defendant asks a reversal upon the ground that the verdict is against the weight of the evidence. Both plaintiff and defendant were thirty-one years old at the time of the trial, October, 1923. They have lived in Chicago all their lives, plaintiff living with her parents. They became acquainted when they were sixteen years of age and saw each other at more or less frequent intervals thereafter. Plaintiff testifies that in February, 1921, defendant proposed marriage and plaintiff replied that her mind was not made up just then and defendant said that he was not financially able to marry just at that time. Plaintiff says that in June, 1921, the proposal was renewed and she accepted, saying that she would marry defendant the following spring; that thereafter they were regularly together and discussed the coming marriage frequently; that she went different places with him and that he called to see her regularly once during each week and on Sundays; that she expected to be married to defendant the following spring but learned shortly after January 6, 1922, that defendant on that date had married Gordina Decker. Defendant admits the proposal made in February, 1921, but says that in April they had

a quarrel over a ring defendant was wearing which was given to him on her deathbed by a former sweetheart. Plaintiff denies this quarrel and denies that she had any conversation relating to this former sweetheart. Defendant testifies that in June plaintiff told him that she did not have the same feeling for him that she formerly had, and that he replied that if this was true they "might as well quit visiting together;" that a few days later, at the request of plaintiff's mother, he called at the house and asked the plaintiff, "Do you want to get married now?" and she replied, "No;" that defendant asked her if she wanted to get married in the fall and she said, "I don't know;" that plaintiff said that she did not want an engagement ring; that defendant then told her that they had better go on together to see if she could forget about the former sweetheart and that in the fall they could talk the matter over again.

It was sufficiently proven by the testimony of both parties and of others that in the fall of 1922 defendant called regularly at the home of plaintiff and that their conduct at this time was that of lovers. Defendant himself admits that he was going with Miss Decker in November and December, 1921, but continued his calls upon plaintiff and his loverlike conduct towards her up to a few days before his marriage to Miss Decker.

There is no remarkable difference between the stories of the parties. The conduct of defendant towards plaintiff in the fall of 1921 can only be explained upon the ground that he considered that they were engaged to be married. Under the circumstances of the case we cannot say that the verdict of the jury, who could observe the demeanor of the witnesses while testifying, is manifestly and clearly against the weight of the evidence.

It is said that the court admitted improper evidence in permitting a question to defendant as to whether he had purchased an engagement ring for Miss Decker, which he answered in the negative. We think this was relevant to the fact, and argument sought

to be deduced therefrom, that defendant had bought no engagement ring for the plaintiff.

The giving of instruction number 14 at the request of plaintiff was not prejudicial error. It told the jury that if they believed there was a promise of marriage in June, 1921, and the defendant failed to keep the same, that the burden was upon defendant to prove that he had "a justifiable cause" for the failure to carry out this promise. Technically this is not germane to the issue. Defendant denied the existence of any promise to marry. This instruction really gave him the advantage of a defense which he had not made, namely, that even though he had contracted to marry plaintiff, his breach would be excused by justifiable cause. This could not prejudice defendant's case.

Instruction number 12 as to the preponderance of evidence correctly states the law. Instruction number 1 given for plaintiff as to the measure of damages is proper as confining the damages to such as are alleged in the declaration. The declaration did not allege any damages on account of ill-health, so that the instruction does not cover such damages, if any.

We are of the opinion, however, that the amount awarded, $2,000, by the jury is excessive. The parties had been acquainted since childhood, and at the time of the engagement were about thirty years of age. The matter was apparently private and there were no attendant aggravating circumstances justifying the award of such a large amount. Plaintiff's conduct suggests that she did not wholeheartedly wish to marry defendant, as she seemed reluctant to fix a date for the wedding. We doubt if her affectionate emotions were so wounded as was her pride, and the case hints somewhat of the motive of revenge on her part. She has suffered no financial loss. She made no

preparation for a trousseau and ~~xxxxxxxx~~ did almost nothing towards preparing those textile articles used in housekeeping, which are usual upon an approaching marriage. Defendant is a member of a firm dealing in real estate and has a salary of $300 a month. He has an interest in a flat building which amounts to about $5,000, also one or two vacant lots. A judgment of $2,000 would take a considerable part of his property.

The verdict is so excessive as to indicate that the jury was moved thereto by passion and prejudice. The amount is such that this court is unable to require a proper remittitur. A new trial should produce a result more reasonably justified by the circumstances, although we take the liberty of suggesting that a settlement between the parties should be made.

For the reason above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

279 - 29368

CORRENE PARTEE OSBORNE,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,
Appellant.

235 I.A. 614

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on two insurance policies issued by defendant on the life of Love Partee, upon trial had a verdict for $200. From the judgment thereon defendant appeals.

Plaintiff's statement of claim alleged that defendant executed two policies of insurance on the life of Love Partee, one dated August 16, 1915, the other June 23, 1919; that they were delivered to her; that she was then the wife of Love Partee; that he died on or about January 4, 1923; that proofs of death were made in compliance with the terms of the policies and that she is the rightful beneficiary by reason of having paid all the premiums.

The evidence shows that plaintiff was not married to Love Partee until April 9, 1919, which was more than three years after the first policy was issued, although plaintiff testified that they were living together at the time the policies were issued. Partee left her November 15, 1919, and she procured a divorce from him in April, 1922. She alleges that he died January 4, 1923. She was therefore not his wife when he died.

Defendant asserts that plaintiff cannot maintain this action as the policies are not payable to her. The first policy mentioned no beneficiary, and the second is by its terms made payable

to the executor or administrator of the deceased. Where no beneficiary is named the right to sue is in the personal representative of the deceased. Massachusetts Mutual Life Ins. Co. v. Robinson, 98 Ill. 324; Neubner v. Metropolitan Life Ins. Co., 146 Ill. App. 282. Assuming that the policies were delivered to plaintiff and that she paid all the premiums, which is doubtful, she still would not be entitled to sue upon the policies. The contracts are between the insured and the company, and in the absence of some expressed provision in the policies whereby the company agrees to pay a certain named beneficiary, suit can only be maintained by the representatives of the insured's estate. U. S. Life Ins. Co. v. Ludwig, 103 Ill. 305.

Although plaintiff testified that she paid the premiums on these policies the receipt offered in evidence to support this testimony does not seem to relate to the policies in question. The receipt is for $5.85 for nine weeks premium, but the premiums on the two policies sued on for the nine weeks would amount to only $2.25. The receipt also seems to refer to a policy number which is not the number of either of the instant policies, and on its face the receipt purports to refer to premium received on the "policy Osborne." Evidently this receipt has no connection with the policies in question and throws very great doubt upon the testimony of plaintiff that she paid the premiums.

The death of the insured, Love Partee, is not established. When plaintiff demanded payment from the defendant's agent she was given the necessary forms for proof of death of Partee. Defendant says these were never filed with the company or its agents. Plaintiff by her testimony sought to show the death of a certain Overton Russel and that he was the same man as Love Partee. There was some evidence of a witness, Johnson, who says that he knew Partee in his lifetime, and that while at the cemetery in company with Partee's brother the casket was opened by the "men who do the burying," and the witness somewhat indefinitely identified the body as that of Partee. The

brother of Partee, who was said to have been present, did not testify. Defendant very pertinently argues that if Partee died there must have been some one who could identify him - either doctors, nurses, his wife, friends, or his brother. We cannot agree with the conclusion of the jury that the death of the insured was sufficiently proven.

Plaintiff's case seems to rest not so much upon the provisions of the policy and compliance with its terms as upon the alleged verbal promises made by defendant's agent, Mr. Cooper, who denies categorically ever having made such promises as claimed by the plaintiff, and the circumstances do not tend to support plaintiff's testimony in this respect.

The judgment cannot stand and it is therefore reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

582 - 29040

MAGA D. FISCHER,
Appellee,
vs.
CHARLES LITT,
Appellant.

235 I.A. 614

Appeal from Superior Court
Cook County.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Charles Litt, from a judgment of $7,000 rendered by the Superior Court of Cook County on a verdict of a jury in favor of the plaintiff, Maga D. Fischer, in an action for damages for injuries alleged to have been received by the plaintiff in a collision between the automobile of the plaintiff and the automobile of the defendant. The present trial is the third trial of the case. Each trial was before a jury. The two trials preceding the present one resulted in disagreements by the jury.

The principal issue in the case relates to the question of the damages. Counsel for the defendant states that he "does not intend to raise any question about the sufficiency of the evidence to support the verdict, so far as the liability of the defendant is concerned." It will only be necessary, therefore, to state and discuss the evidence insofar as it bears on the matter of damages. Counsel for the defendant has failed to index in the abstract the names of the witnesses, the pages of the direct, cross and re-direct examination as required by Rule 18 of this court.

The plaintiff testified that there were three passengers in her automobile besides herself; that she was driving and was sitting on the left front seat; that when the automobiles collided her automobile "went over on the side" and she was injured. Her testimony as to how she was injured is somewhat confused. It is

as follows: "Well, when the car went over on the side, the young lady that was sitting on the stool slid over on to the doorway and the cushions on the seat that I was sitting in slid out from under me and this stool - it has no back to it, it has just round short points - and I struck against that going over and at the same time - I really couldn't say what else happened to me, because on the left side of my leg from my knee to my hip, the blood was under the skin, and was in that condition - the whole leg was in that condition - for two weeks. What I struck the leg part on I don't know, unless it was on the handle that lowers the window in the door, and the steering wheel got me in the stomach." The plaintiff testified further that she felt as though she had a terrific beating all over her body; that there was a break in her skin just below the knee, from a pin or something and there was blood flowing from it; that she was taken to a hospital in an automobile, but that she did not receive any treatment from any doctor or interns in the hospital; that she washed off the blood herself in the ladies' washroom, "and stuck a piece of toilet paper on it;" that she left the hospital and returned to the scene of the accident where she met the defendant and had a conversation with him; that she then went to the Northwestern Depot, met her husband, returned to the hospital to look after the passengers who had been injured, and returned to her home; that she went to bed about 9 o'clock that evening; that she had no treatment before she went to bed; that the next morning, while taking a bath, she noticed a hernia on her left side which was protruding and which was about the size of a small egg; that she has suffered very much from hernia since the accident; that on the right side it was not so bad; that she had been operated on for hernia on November 1, 1920; that after the operation she "felt no effects whatever;" that after the accident, at the suggestion of her

husband, who is a physician, she wore a rubber binder; that the morning after the accident she was examined by her husband; that on either the second or the third day after the accident she was examined by Dr. William C. Wermuth, who was the family physician; that Dr. Wermuth prescribed a massage, rest and quiet; that from the time of the accident, namely March, 1921, to December, 1921, or January, 1922, the only treatment that she took was massage rubs, hot epsom salt baths; that the day after the accident she went with her husband in a taxicab to the hospital to see her friends, who were passengers in her car at the time of the accident, and who were injured in the accident; that either the second or the third day after the accident she went over to the office of the defendant; that following the accident there was a period of time when she was up and around doing her daily routine, going out whenever she wished to; that the first time that she had any real severe pain was three or four weeks after the accident; that at that time she noticed a severe pain at the end of her spine; that at the time of the accident her whole body was bruised severely; that she had pain all over her whole body; but the severest pain that she noticed on the spine was three or four weeks after the accident; that about three or four weeks after the accident she was confined to her bed with pain; that she would lie down and would be unable to get up; that she would have to have assistance to help her up; that she was not confined to her bed continuously at that time; that after the accident she slept under opiates for almost a year; that she has been nervous and hysterical since the accident; that pain in the sciatic nerve commenced on January 10, 1922; that it came on suddenly; that she was confined to her couch with her clothing on for two days; that it took three men to move her couch down the front hall to her

front bedroom and to put her into her bed; that her clothing had to be cut off of her; that from then on she was continuously confined to her bed until March, 1921; that she would scream at the top of her voice when any one touched her or attempted to move her; that there was a pressure against the muscles of the rectum that did not allow the bowels to move, and that it was 6 or 7 days before the bowels would move; that she was attended by Dr. Vermuth until February or March, 1922, when he went to Japan; that at this time Dr. Albert Janzick, an osteopath, was called in and that she received treatment from him; that she noticed an inclination of the hips which resulted in one leg being drawn up; that her heel is numb; that her right leg is two inches shorter than her left; that she used a crutch until August, 1922, when she was able to get around with a cane.

Dr. William O. Vermuth testified on behalf of the plaintiff that he examined the plaintiff in March, 1921, about 3 or 4 days after the accident; that he made an ordinary examination because it was so painful; that on the following day he visited her again and made a more thorough examination; that on his first visit the pain was general, all over, the spine, the leg and the pelvis; that on his second visit he made a more thorough examination; that he advised rest; that she was lying in bed on her back; that after the second visit he visited her daily for about two weeks; that in that two weeks there was some change regarding the pain, and in about three weeks it was worse again; that after the third week the pain was along the left leg; that he continued to visit her for about 4 weeks altogether, and that he has not treated her since; that on his first visit he was told that the accident had happened 3 or 4 days before; that he said, "Well, you certainly had some knock didn't you;" that he saw bruises and "hemorrhagic things"

in the skin of the leg; that 3 or 4 days afterwards the sciatic pain developed into an acute form; that he is clear in his mind that the sciatica was present and that the plaintiff complained of it within a week after the accident; that it let up for about 2 weeks and then it returned in a more virulent shape; that at the time of his last visit he advised her to have a masseur to relieve the pain along the lower part of the sacrum and the leg, the sciatic pain; that sciatica is due to infected tonsils or teeth or an intestinal infection, and also from traumatism; that he hardly thinks an injury to the fourth and fifth lumbar is apt to cause a sciatic condition, but that an injury to the coccyx would; that about 4 or 5 days after the accident he examined her nose, teeth, heart, lungs, abdomen, limbs, whole body under pressure, and made tests of her urine; that in making all these tests and examinations he was looking for a focus of infection; that the only thing he didn't do was to X-ray the teeth; that at that time he didn't think there was a fracture; that in April, 1928, he went to Japan; that he operated on the plaintiff for a double inguinal hernia; that the muscles were good and there was nothing at the time to indicate the danger of a recurrence; that he also operated on the plaintiff for a ruptured appendix about 12 years prior to the operation for hernia; that in the operation for appendicitis he removed the right ovary, the left ovary and the right tube, all of which were one mass; that the condition of the appendix, ovaries and Fallopian tubes was due to a long chronic appendicitis; that the organs were four or five times bigger than they should be and were gangrenous in appearance; that the removal of these organs would not cause nervousness.

Dr. Albert Jansick testified on behalf of the plaintiff that he is an osteopath; that he first saw the plaintiff at

her house about the middle of March, 1922; that she was in bed; that he examined her back and found that the lower part of the lumbar, fourth, fifth, were rotated; that he also found a rigidity at the coccyx; that he also found that the sciatic nerve was inflamed; that he had an X-ray picture taken; that it was shown on the first trial but had been lost; that he found that there was a pressure outside of the coccyx, and that it was not movable; that it was a solid bone deposit, and around the second segment there was a hardening, a calcareous deposit, or lime deposit, which indicated a fracture of the bone; that the plaintiff had a fracture of the coccyx; that the lime deposit would cause a rigidity in about 6 weeks; that the condition might arise immediately after the accident or after the deposits are already settled; that there would not necessarily be immediate pain after a fracture of the coccyx; that there would not be any pain unless the nerve was immediately involved.

In rebuttal the plaintiff testified that Dr. Wermuth ceased taking care of her when he went to Japan; that he did not take care of her any time after the fourth week after the accident; that he did not recommend a masseur, but that she got the masseur when Dr. Wermuth left for Japan; that Dr. Wermuth came to her home 3 or 4 days after the accident; that he saw her 3 or 4 weeks after that once or twice a week; that the visits to her home were primarily to see her husband; that Dr. Wermuth was called in to take care of her either the latter part of December, 1921, or the early part of January, 1922; that at that time she did not have bruises on her body.

Dr. George J. Asto testified on behalf of the defendant that a fracture of the coccyx of sufficient size that callous had formed about a half an inch in area would disable a person at the time the fracture was sustained, because of the pressure

of the dislocated coccyx on the adjoining tissue; that if a person with such a fracture attempted to walk there would be pain "almost to the point of disability"; that in his opinion the plaintiff did not sustain a fracture of the coccyx at the time of the accident; that in his opinion the sciatica of the plaintiff was not caused by the accident, for the reason of the long interval between the accident and the manifestation of the sciatica; that in his opinion the recurrence of the hernia was not caused by the accident because it was not noticed until "three days following" the accident; that if one of the Fallopian tubes was left in the plaintiff's body in an inflamed condition, he might assume that there was a focus of pus left in the body that might produce the neuralgic condition.

Dr. A. C. Tenney testified on behalf of the defendant that in his opinion the plaintiff did not sustain a fracture of the coccyx at the time of the accident because of the absence of what might be called localized symptoms; that if you hit the bones enough to break them you produce immediately local symptoms, discoloration, bruising, pain, difficulty in emptying the bowels, difficulty in walking, amounting to severe disability; that a person so injured "could not go through the walking and the travelling about" that the plaintiff "is alleged to have gone through"; that in walking the muscles would move the fractured coccyx around; that it would be just like getting a finger broken and moving it around from side to side; that you step with the right foot which throws the bone over to the left, and when you step with the left foot it throws the bone over to the right, and that when the person sits on the stool to empty the bladder there would be excruciating pain; that in his opinion there is no causal connection between the sciatica and the accident; that the sciatica is due to an acute embolic neuritis involving the sciatic nerve; that furthermore "the

interval of 9 months or more approximately from the time of the injury to the time of the occurrence of this sudden thing, with intervening comparative good health, absolutely eliminates the accident as a factor in any measure;" that the complete removal of the ovaries and one Fallopian tube from a woman of 26 years of age would bring about a change of life in the intervening 10 years; that some women suffer great disturbance such as hot flashes and mental or nervous disturbances.

The illness of the plaintiff must be considered in reference to two distinct periods of time - the period of time beginning at the time of the accident, namely March 27, 1921, and continuing to January 10, 1922, and the period of time beginning about a year after the accident, namely, about January 10, 1922, and continuing to the time of the action. The illness which began about January 10, 1922, was the more serious and severe illness, and was due principally to an alleged fracture of the coccyx. We have fully set out the evidence relating to the illness of the plaintiff during the two periods of time. In our opinion the precise question to be decided, on the inquiry whether the damages are excessive, is whether the accident was the proximate and efficient cause of the illness of the plaintiff, which began about January 10, 1922. As we view the evidence, the probabilities are that the accident was not the proximate and efficient cause of that illness.

Assuming that the preponderance of the evidence establishes the fact that the plaintiff's coccyx was fractured, and that the sciatica and the other acute symptoms which appeared about January 10, 1922, resulted from the fracture, we do not think that the preponderance of the evidence shows that the fracture of the coccyx was caused by the accident.

It will be observed that the issue whether the fracture was probably caused by the accident must be determined largely

on the testimony of Dr. Jannick, a witness in behalf of the plaintiff, and Drs. Aste and Tenney, witnesses in behalf of the defendant. As we have set out the testimony of these witnesses at length, we do not think that it is necessary to repeat or to discuss in detail their testimony. It is sufficient to state that we are of the opinion that in view of all the facts and circumstances in evidence, the testimony of Drs. Aste and Tenney seems to us more probable than the testimony of Dr. Jannick. We do not think, therefore, that the plaintiff is entitled to recover damages on the basis of a fractured coccyx. Whether the jury considered the fractured coccyx as one of the elements of damage, we cannot definitely determine, but from the amount of damages, namely $7,000, which the jury allowed, it would seem probable that they did. In any event in the view we take of the case, the damages allowed by the jury are excessive. We are of the opinion that $4,000 will be a fair and reasonable compensation. If within 10 days from the filing of this opinion, the plaintiff will remit $3,000, we will affirm the judgment; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

McBurney, P.J., and Matchett, J., concur.

APPEARS ON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.

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THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

THOMAS WALSH et al.,
Plaintiffs in Error.

235 I.A. 614

ERROR TO CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error Walsh, Hayes, Shields and Lane were found guilty by a jury of the crime of conspiracy and were by the court sentenced in conformity with the verdict to imprisonment in the county jail for a term of one year. The indictment was returned January 13, 1922. Plaintiffs in error made a motion to quash the indictment for the alleged reason that the grand jury which returned it had not been drawn according to law. The motion was denied, and it is argued that the court erred in that respect. The defendant in error contends that plaintiffs in error are not in a position to argue this question, but we think the question is properly before us on the record.

The method by which the grand jury in Cook County shall be drawn is set forth in section five of an act to authorize judges of courts of record to appoint jury commissioners and prescribing their powers and duties, approved June 15, 1887, as amended by an act approved June 9, 1897. (See Smith-Hurd's Illinois Revised Statutes, 1923, pages 1243 to 1244.)

The plaintiffs in error set forth specific respects in which it is claimed that this statute was not complied with in selecting the grand jury which returned the indictment. First, they say, that instead of making up a jury list of all qualified electors every four years as required by the law, the jury com-

missioners made up no jury list at all; they also say that an old Chicago directory of 1917 covered with red, green, purple and black pencil marks was supposed to be the jury list.

Section two of the jury commissioners' act provides in substance that the commissioners, upon entering upon the duties of their office and every four years thereafter, shall prepare a list of all electors between the ages of twenty-one and sixty years possessing the necessary legal qualifications for jury duty to be known as the jury list; that the list may be revised and amended annually in the discretion of the commissioners; that the name of each person on said list shall be entered in a book or books to be kept for that purpose, and opposite said name shall be entered the age of said person, his occupation, if any, his place of residence, giving street and number, if any, whether or not he is a householder, residing with his family, and whether or not he is a freeholder.

The evidence tends to show that in making up the jury list the commissioners made use of the city directory for the City of Chicago and the poll lists for the country towns of Cook County outside of the City of Chicago. It does not, we think, show that either the city directory or the poll lists or both together were regarded as the jury list. The jury list, as the statute declares, is "a list of all electors between the ages of twentytwone and sixty years, possessing the necessary legal qualifications for jury duty."

The evidence shows that the city directory of the City of Chicago was one of the best-known means available of obtaining the names of the qualified electors within the City of Chicago. It also shows that the poll lists for the country towns was one of the best known means of getting the names of such electors residing in these towns.

In a community such as the evidence shows Cook County to be, where the number of qualified electors might be as many as

five or six hundred thousand, it is manifestly impossible upon any one day to have a complete and perfect list of these qualified electors. We take it to be the law that the word "elector" as used in the statute must be taken in a broad sense and as at least including all male persons above the age of twenty-one who are capable of voting, whether they are registered or not. (See 28 Corpus Juris, 767, Bergevin v. Curtis, 127 Calif. 86.)

We think the evidence taken shows that the jury commissioners adopted, if not the best, at least a good and highly efficient method of getting the names of all the qualified electors as required by the law.

This cause was argued orally, and at the time of the argument counsel for the plaintiffs in error was asked to suggest a better method than that used by the jury commissioners. The only suggestion made in reply was that the jury commissioners should have followed the method provided in Section 3 of the act. Said section 3 provides:

> "The said commissioners shall have power with the approval of the said judges or majority thereof, to appoint a competent elector in each or any election, precinct or district, who shall be known as a deputy jury commissioner and whose duty it will be to furnish said jury commissioners from time to time as required a list of the qualified electors residing in said voting precinct or district and such other information as may be required by said jury commissioners."

Plaintiffs in error seem to contend that this provision is mandatory, and we think it would be necessary for us to so hold in order to sustain their contention. It is apparent that it was not the intention of the legislature that this provision should be mandatory. The authorization of that method is expressly conditioned upon the consent of a majority of the judges. We take judicial notice of the fact that the judges of the courts of record of Cook County have not authorized the appointment of these deputy commissioners. It is apparent that such authorization would require the creation

of something like 2500 additional office holders as a part of the machinery of the courts, thus presumably adding to the burden of the community without conferring commensurate benefits. The contention of plaintiffs in error therefore, that the indictment should have been quashed because the jury list was not made up as provided in section 3 aforesaid, can not be sustained.

It is further contended by plaintiffs in error that the jury commissioners disregarded the law in that they excluded from the jury list all persons who had served within four years. The testimony of the chief clerk, Mr. Peterson, shows that it was the custom of the jury commissioners to exclude such persons from the list of those who might be called upon for jury service.

As applied to a county containing a number of electors as large as Cook County, this criticism would seem to have little merit. It is suggested that section 14 of the act concerning jurors, which provides that the fact that a juror has served within one year previous to the time he is offered as a juror, shall be sufficient cause for challenge, and that such person when called shall be exempt from such service unless he waives it, is inconsistent with the practice and custom of the jury commission in this respect. The statute suggests the revision of the jury list every four years. The objection at the most is a mere technicality. We hold that under the circumstances the exclusion of all those who have served within four years is a matter well within the discretion of the commissioners.

It is the further contention of plaintiffs in error that "it was the general policy of the jury commissioners to exclude persons whose occupation was stated in the directory to be that of laborer." They point out that in the jury record there were only 495 names of persons whose occupation was stated in the directory to be that of "laborer." The testimony of Commissioner Barnett is

uncontradicted to the effect that there was no discrimination on account of occupation in the making up of the list. Upon what basis the compilers of the city directory classified persons as "laborers" does not appear, but an examination of its pages which are in evidence indicates that members of trades unions were not so classified, and particularly is this shown to be true of the trades unions to which plaintiffs in error belonged. No attempt was made by plaintiffs in error to show either that the names of persons composing the grand jury which found the indictment or petit jury which tried the case indicated the exclusion of those who toil. We presume that if such a fact or such facts could have been shown, the evidence would have been presented. The jury commissioners ought not to discriminate in the making up of the jury list against any electors because of the particular occupation in which such electors may be engaged, but the evidence here is not sufficient to show such discrimination. On the contrary, we think it shows a substantial compliance with the law.

As was said by our Supreme Courtin Healy v. People, 177 Ill. 306, at page 316, and referring to the jury commission law:

> "When the enactment is carefully considered it will be observed that the chief design is to accomplish two purposes: first, to place upon the list of those who may be chosen and summoned to serve as jurors, the names of those electors, and those only, who should possess qualifications which the law-making power deemed necessary and requisite to the proper discharge of the duties of a juror; and second, to so control the selection from such list of the persons who should be summoned to render jury service that no interested person and no interest could in any manner participate in such selection, the ultimate design being to secure for the trial of causes qualified and impartial jurors, not only on the regular panel but in the trial of each particular cause."

Plaintiffs in error have cited March v. People, 226 Ill. 464, and the recent case of People v. Easton, 309 Ill., 77, as tending to sustain their contention. Neither of these cases arose in Cook County and the jury commissioners' act was not therefore construed in either case. March v. People, supra, has been distinguished in the

later case of People v. Donaldson, 258 Ill., 19, where it was stated in substance that the language of that case was not intended to apply to every possible omission of public officials to follow the letter of the statutes, and that if it was so understood and applied all statutes imposing duties upon public officers would be held to be mandatory. In that case the grand jury had been selected nineteen days before the first day of the term of court, while the statute required that twenty days should intervene between the selection of the grand jurors and the day upon which they might appear for service.

The court said that this provision of the statute was not designed to protect the rights of persons whose cases were to be investigated and passed upon, but, for the convenience of the sheriff in serving the jurors and of the jurors themselves. The cases in other jurisdictions are there reviewed and the court decides that the provision of the statute was merely directory and the situation wholly different from that which arose in People v. Maran, where the county board had acted in selecting the jurors individually and not at any regular or special meeting. In People v. Boston, supra, the Supreme courtheld in substance that the jury list as finally compiled should be adopted by a formal resolution of the county board, and that the county board must act as a body and officially and not simply as individual members of the board. It is not here suggested that the jury commissioners were not organized as a body for the performance of their duties.

Without reviewing at length the decisions from other states, we think it sufficient to say that the views here expressed are sustained by the great weight of authority as shown in well considered opinions of courts in different jurisdictions. Kirksey v. State, 11 Ga. App. 148; Hellers v. State, 125 Md. 367; Commonwealth v. Jordan, 207 Mass. 259; Commonwealth v. Gillespie, 207 Pa.

274; Ferris v. People, 35 N. Y. 125.

It is next contended that the verdict is contrary to the evidence and it is ingeniously argued as to some particular transactions that the evidence was insufficient to prove the offense charged and that as to others the offense proved was barred by the statute of limitations. This entire argument is based upon the theory that each one of these counts sets up an independent and separate conspiracy. Lowell v. People, 229 Ill., 227, is cited to that effect. In that case the indictment contained two counts, each of which charged that the defendants had conspired together to cheat and defraud by false pretenses. It is apparent from the language of the opinion that distinct and separate crimes were charged in these counts. The courts there said:

> "It is not necessary to the validity of an indictment for a conspiracy to cheat and defraud that it should set out the names of the persons intended to be cheated and defrauded if the conspiracy was not aimed at a particular or definite individual but was aimed to cheat and defraud the public generally. In such case an indictment containing appropriate averments that a conspiracy was entered into by the defendants for the purpose of defrauding the public generally, or the state, or the United States, as the case may be, would be a good indictment. 2 Bishop on Criminal Procedure, section 210."

In the instant case plaintiffs in error made a motion that the state should be required to elect upon which count or counts it would prosecute, but this motion was denied by the court and plaintiffs in error apparently acquiesced in the view that the court properly denied their motion, since error has not been assigned upon that ruling. The distinction is vital, as was pointed out in the case of Ochs et al. v. People, 124 Ill., 399, page 422, where the court, after quoting the rules governing the proof of conspiracy as stated by Greenleaf, says:

> "We have quoted thus at large because what is thus announced seems completely to meet and dispose of the point as to there being conspiracies in groups, and not one general conspiracy, and of the conspiracy being of another kind than the one charged, and of objections on that score to the reception of the evidence of individual acts which was received, and to be

in justification of the instructions which were given."

The same rule has been stated in the comparatively recent cases of People v. Munday, 280 Ill. 51, and People v. Curran, 286 Ill. 302. In People v. Munday, supra, the indictment consisted of thirty counts, charging Munday and other defendants with the crime of conspiracy. The defendant there made a motion to require the state to elect upon which count or counts it would ask conviction. This motion was denied and assigned and argued as error in the Supreme Court. The court, however, held there was no error, saying:

> "It is contended by plaintiff in error that various offenses are charged in the different counts of the indictment and that these offenses are distinct and separate from each other and do not arise out of the same transaction, and that the State should have been put to an election. Plaintiff in error and his co-defendants were charged with conspiracy. While in the several counts separate and distinct objects of conspiracy are alleged one general conspiracy is charged, and the various acts which it is alleged in the several counts plaintiff in error and his co-defendants conspired to commit are all parts of the same general conspiracy. The right to require the state's attorney to elect upon which count of an indictment he will rely for conviction is confined to cases where the offenses charged in the different counts of the indictment are distinct from each other and do not arise out of or form parts of the same transaction. Goodhue v. People, 94 Ill. 37; Andrews v. People, 117 Ill. 195; Herman v. People, 131 Ill. 594; People v. Warfield, 261 Ill. 293."

We have gone over the evidence with some care and viewed from the standpoint which we have already indicated, we think it establishes the guilt of the defendants beyond any reasonable doubt. The oral evidence of the witnesses who testified for the State is corroborated by written evidence such as checks tending to show the payment of money at the times and in the amounts alleged, and other written evidence of a convincing nature.

As we understand the law of this State, the crime of conspiracy is complete upon the formation of the conspiracy without the commission of any overt act on the part of the conspirators, tending towards the consummation of the object of the conspiracy. That seems to have been the view of the common law judges, although,

in the case of conspiracies against the government of the United States, a different rule obtains by virtue of the statute which defines this offense. (See Hyde v. U. S., 225 U. S. 347.) There was, however, in this case, evidence of overt acts on the part of each of plaintiffs in error.

The evidence shows that the plaintiffs in error worked together as by design, and that they were successful in exterting considerable sums of money from the victims of the conspiracy into which they had entered. The evidence shows that Hayes and Walsh were connected with the Sheet Metal Workers Union, Hayes being apparently under the control and direction of Walsh; that Shields was the business agent of the Painter's Union, while Kane was the business agent of the Plumber's Union. It is significant that no unions other than those represented by these particular defendants found any occasion in connection with the building transactions in evidence, to threaten strikes or call them, or call the men out from their work, or that any demand whatsoever for money for refraining from any of these things was made. In connection with the work done by those associated with these defendants for the different persons and corporations named in the indictment, strikes were called and called off upon the payment of money therefor. This is established by the evidence beyond all reasonable doubt. Indeed, plaintiffs in error do not argue that such facts are not established. Their whole argument is directed to the point that the various count of the indictment set up separate and distinct conspiracies in regard to these several owners and contractors and so assuming they proceed to contend that particular defendants are not connected up with a particular transaction or that the Statute of Limitations has run upon each one of them.

It is perhaps unnecessary to repeat what has in substance been so often said by the courts of this and other states wit

reference to crimes of this character; namely, that the evidence upon which a conviction must rest is in the nature of things usually circumstantial, and that it is rarely that the prosecutor will be able to get direct evidence that a given number of defendants have met and specifically agreed by words spoken that they will put into effect and carry out an unlawful design.

Conspiracies are usually established, not by proof of words spoken, but by proof of acts done, all of which fit into a general scheme and show concerted action to a common end by those participating in the conspiracy. Such being the case, it follows that, after the conspiracy has been formed, the act of any one of the conspirators along the line of carrying out the object for which it was formed is the act of each and every conspirator. These principles become important not only in the matter of determining what evidence is admissible and weighing it, but also upon the determination of the question as to what time the Statute of Limitations has run against the crime charged. The contention of plaintiffs in error that the verdict is against the evidence cannot be sustained.

As to two counts of the indictment, plaintiffs in error have raised a question which, if these were the only counts in the indictment, would be a serious one.

In the sixth and seventh counts the defendants were charged with a conspiracy against "The Portage Theater Company, a Corporation." The clerk employed in the Corporation Department of the Secretary of State testified that no charter had ever been issued to the Portage Theater Company, a Corporation; that no such corporation existed in this State, and that no foreign license to do business in this State had ever been issued to a corporation of that name.

It was also shown that the name used in carrying on the business of the corporation was that stated in the indictment. Plain-

tiffs in error objected to the evidence on the ground that there was a variance and moved to strike it out. The motion was denied and at the request of the State the court instructed the jury that "As a matter of law, the difference between the name 'Portage Theater Company, a Corporation,' as alleged in the indictment, and the name 'Portage Theater Building Corporation,' as it appears in the charter granted by the Secretary of the State of Illinois is not a material difference and does not amount to a defense in this case." Plaintiffs in error cite Sykes v. People, 132 Ill., 32, and People v. Mavotany, 305 Ill. 549, to the point that the difference between these two names constituted a variance and that the instruction of the court was erroneous. In Sykes v. People, supra, the plaintiff in error had been indicted and convicted on a charge of issuing fraudulent and false warehouse receipts with intent to defraud "The Merchant's Loan and Trust Company, organized and incorporated under and by virtue of the laws of the State of Illinois." The proof upon trial showed that the name of the corporation was "The Merchants Savings Loan and Trust Company," and the court there held that notwithstanding the proof of user by the corporation of the name as stated in the indictment, there was a material variance and reversed the judgment. The opinion of the court seems to proceed upon the theory stated in Bacon's Title Abridgement, CI, that there is a distinction between a corporation and a natural person as to the matter of names, in that with the corporation name is of "a very being of the corporation," and that without the name it could not perform corporate acts, "for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name." There was a vigorous dissenting opinion in that case. In People v. Mavotany, supra, the plaintiff in error had been convicted in the Criminal court of Cook county of the crime of obtaining property by means of the confidence game. In the indictment the person charged was named as "Kapan Manian."

The evidence showed that defendant's name was Mananianian, and the court said:

> "In indictments for offenses against the persons or property of individuals the Christian and Surnames of the parties injured must be stated if known, and the name stated must be either the real name of the party injured or that by which he is usually known; (Aldrich v. People, 225 Ill., 610; Sykes v. People, 132 Ill., 32; Willis v. People, 1 Scammon, 389); and it is essential that the name of the party injured shall be proved as laid. There is no conflict of authority on this point."

The court said, however, that it was not a question of variance, but of a failure of proof that the indictment charged a crime against a certain person, and the proof failed to show this but showed that the crime, if any, was against another person, and it was held that the name of the person from whom the property was obtained became material to the description of the offense and thus being a material averment must be proved, and that a failure to prove it was not a mere variance but a fatal lack of evidence to prove the crime charged. The court there quotes with approval the case of People v. Weisman, 296 Ill. 156, (on which case, with others, defendant in error relies) to the effect that the modern rule is that a variance as to names alleged in an indictment and proved by the evidence is not to be regarded as material unless it shall be made to appear to the court that the jury was misled by it or that some substantial injury was done to the accused thereby. It is not to be denied that the tendency of modern cases is away from the strictness with which the rule as to variances in matters of this kind was formerly applied. In Shephard v. People, 72 Ill., 480, the defendant was convicted for the murder of one Wesley Johnson. It appeared there was no proof of the Christian name of the deceased and that he was mentioned in the evidence by his surname only. There was other evidence, however, in the record by which the murdered man was fully identified, such as that he was a barber at the place where the killing occurred, and it was held to be sufficiently established thereby that Johnson was Wesley Johnson. The court there said that

the object in naming the injured person in criminal proceedings is to identify the transaction so that the accused may not be twice tried for the same offense, and that there was no substantial variance. In Little v. People, 137 Ill., 155, the plaintiff in error was found guilty of larceny, in that he had stolen property said in the indictment to have been owned by "John F. Hinckley," whereas the evidence showed only that it was the property of "J. F. Hinckley." The Supreme Court, holding that it was a question of identity, affirmed the judgment upon the authority of Shepherd v. People, supra.

Following these are Clark v. People, 224 Ill. 554; People v. Jennings, 298 Ill., 286; People v. Cunningham, 300 Ill. 376, and People v. Agney, 304 Ill. 404. The leading case cited in these opinions is that of State v. Long, 213 S. W. 436, where an indictment which charged the theft of hogs (the property of "The University of Missouri," and by which name there was proof that the owner was generally known instead of its legal and corporate name, "The Curators of the University of Missouri") was held sufficient. There is no claim in this case that the misnomer of the corporation as it appeared in the indictment in any way misled plaintiffs in error, or that they were thereby surprised or prevented from presenting their defense, nor especially, in view of the fact that the evidence has all been preserved in the record by a bill of exceptions, do we think that plaintiffs in error would be precluded, if again indicted for the same acts, from showing the former conviction as a complete defense.

If, then, we are to have regard to the reason of the rule, it would seem that the contention of plaintiffs in error can not be sustained, although the case is very hard on principle to distinguish from Sykes v. People, supra. Moreover, even if it be

conceded that, by reason of this lack of proof, the judgment could not be sustained under these two counts, there are four others under any one of which, if the proof is sufficient, the conviction should be sustained. It follows that this contention of plaintiffs in error cannot avail.

Plaintiffs in error further contend, however, that the court erred in that it gave instructions which were not only inconsistent but did not correctly state the law applicable to their defense of the Statute of Limitations.

The court modified an instruction requested by the defendants, giving it in the language following:

> "The prosecution in this case was commenced by the return of the indictment against the defendants by the grand jury of Cook County on January 13, 1922, and, if the jury believe from the evidence that any defendant committed no overt act in furtherance of the alleged conspiracy and had no connection with the alleged conspiracy for a period of more than 18 months prior to January 13, 1922, then the prosecution of the alleged crime as to such defendant is barred by the Statute of Limitations of the state, and it will be your duty under the law to find such defendant not guilty."

At the request of the state the court charged as follows:

> "A conspiracy once formed is presumed to exist whenever and wherever one of the conspirators does some act in furtherance of its common design. Applying this rule of law to this case, if you find beyond all reasonable doubt that one or more of the defendants did some act in furtherance of the alleged conspiracy, and if you find such conspiracy existed as alleged in the indictment or some count thereof at any time after July 14, 1920, then such act would constitute a continuance of said alleged conspiracy. If you find beyond reasonable doubt in this case that a conspiracy as alleged in the indictment or some count thereof existed prior to July 14, 1920, and that, after said date, one or more of the defendants committed an overt act in furtherance thereof, then such overt act will prevent the running of the Statute of Limitations as to such defendants; or, in other words, if you find beyond all reasonable doubt in this case, that an act in furtherance of said alleged conspiracy was committed by the defendants or some of them after July 14, 1920, then the Statute of Limitations would not serve as a defense for any defendant participating in such conspiracy."

Plaintiffs in error contend that this last instruction was erroneous in that it assumed that the jury would infer that a conspiracy under the second and third counts in effect before July 14, 1920, was not abandoned by any of the conspirators if any one of them committed an act in furtherance of the conspiracy after that date. They say that the jury might well have inferred from the evidence that all of the conspirators except Shields abandoned the conspiracy before July 13, 1920; that according to the original agreement all money was to be paid by the Chicago United Theaters, Incorporated, to plaintiff in error Kane; that the total amount to be paid was $3,000; that the last payment was long overdue, but that Kane did not come for it; that Shields appeared and was told that the payments to Kane had been stopped because there was some doubt whether he was turning the money over to the others as agreed. Shields was asked, "If this thousand dollars is now paid to you, would that settle the matter?" to which Shields replied that as far as he was concerned it would.

Plaintiffs in error say: "If Kane and Hayes were still in the conspiracy, why did not Kane collect the money as agreed upon? Shields alone insisted on collecting the last one thousand dollars, and the court should have permitted the jury to decide whether the conspiracy was abandoned by Kane and Hayes." It is apparent that this argument also is based upon the theory that there are as many conspiracies as there are counts in the indictment, and that these are separate conspiracies and not parts of one general conspiracy. In People v. Blumenberg, 271 Ill., 180, on which plaintiffs in error rely, the court said: "A conspiracy once formed is presumed to exist whenever and wherever one of the conspirators does some act in furtherance of its purpose. We have

of the conspiracy so as to prevent the running of the Statute of Limitations. Ochs v. People, 124 Ill., 399; Cook v. People, 231 Ill., 9." Plaintiffs say, however, that the facts in these cases show that the court merely decided that the performance of an overt act continues the existence of a conspiracy, so as to prevent the running of the Statute of Limitations as to defendants participating in such overt act.

Whatever the facts in these particular cases may have been, we do not understand that such is the law. The law is, and the court in other instructions, to which plaintiffs in error do not object, charged that after a conspiracy is formed the acts of each and all conspirators in furtherance of the conspiracy are binding upon all other conspirators; that it is not necessary that all the conspirators should actually assist in doing all the acts necessary to carry out the conspiracy; that one of the conspirators may do one act and the others other acts, if the tendency, intent and purpose of all the acts is in pursuance of the unlawful agreement to carry out and effectuate the same.

If this is a correct statement of the law, which we do not doubt, then the act of Shields in accepting the thousand dollars in this matter within eighteen months of the time within which the indictment was found, must in law be also considered the act of Walsh, of Kane and of Hayes. A conspiracy after it is formed (and provided some overt act is done looking towards the accomplishment of the object of the conspirators) is a continuing offense necessarily from the very nature of it.

Plaintiffs in error say that if the rule laid down by the court is to be held correct, then, no matter after how long an interval if any member of the conspiracy does an over act, all the original conspirators may be convicted without any proof that they

connived at the commission of such overt act; and that under such a doctrine a charge of conspiracy would never be barred. This argument raises a point which is interesting but which we hardly think arises on the record before us.

There is authority to the effect that one who has become a party to a criminal conspiracy must, in case he desires to withdraw therefrom, accomplish the purpose by some affirmative act from which his intention may be discerned. (See People v. Lyons, supra.) But if we regard, as we must, the indictment in the instant case as charging only one conspiracy, it is apparent that plaintiffs in error did not at any time abandon the conspiracy. Whether or not there might be such lapse of time between the commission of overt acts as to raise a presumption that defendants not participating in such overt act had abandoned the conspiracy, is a question which does not arise on this record and which it is therefore unnecessary for us to decide. We think the instructions were not erroneous as applied to the facts in this case, that plaintiffs in error have had a fair and impartial trial according to the law of the land, and the judgment will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

7 - 28752

4072

MID-WEST GENERAL MILLING COMPANY,
a Corporation,
Defendant in Error,

vs.

MARTIN GNATEK et al.,
Plaintiffs in Error.

235 I.A. 615

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MARCHETTI DELIVERED THE OPINION OF THE COURT.

The defendants brought this writ of error to reverse a judgment in the sum of $501.50 entered against defendants and in favor of plaintiff on the finding of the court. An order of severance was allowed in this court and the writ is prosecuted by defendant Martin Gnatek alone.

The statement of claim showed a demand for goods sold and delivered, and the defense set up in the affidavit of merits was that the goods were sold, if at all, not to defendants but to a corporation known as the Western Casing Company.

Defendant in error heretofore made a motion to strike the bill of exceptions, which was after due consideration denied. It again presents the matter in its brief and argument, but we are disposed to adhere to our former decision, (see Elliott v. Trendel, 227 Ill. App. 359) and especially since the bill of exceptions was incorporated into the record upon the stipulation of the plaintiff (defendant in error.) Lederbrand v. Pickrell, 167 Ill. 594.

An examination of the evidence discloses that there is no theory upon which the judgment rendered can stand. The uncontradicted evidence shows that the Western Casing Co. was a corporation; that the goods sold by plaintiff were in each instance billed to the corporation and not to the individual sued.

Apparently the corporation had failed to make its annual report to the Secretary of State as required by the

statute, and its name had been stricken from the list of corporations for that reason. This, however, does not amount to dissolution. People v. Ross, 207 Ill. 352; Kelly v. Lehmann, 207 Ill. 33. Snatek was one of the incorporators of the Western Casing Company, but he testified positively that he did not buy the goods personally, and the various invoices as well as the correspondence about the transaction show conclusively that plaintiff dealt with and gave credit to the corporation.

The judgment of the trial court will therefore be reversed and judgment of nil capiat entered here.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

McSurely, P. J., and Johnston, J., concur.

26 - 29077

No. 23

EUGENIA MICHELINI,
Defendant in Error,

vs.

C. H. McDONALD,
Plaintiff in Error.

235 I.A. 615

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $2650 entered in favor of the plaintiff on the verdict of a jury in an action on the case for negligence, motions for a new trial and in arrest of judgment having been overruled.

The suit was brought against two defendants, and the declaration alleged that these defendants owned, controlled, operated and managed an automobile which they were driving along Jackson boulevard near its intersection with South State street, and that they drove it so negligently that it struck the plaintiff, to her great injury.

The defendant, McDonald, who is plaintiff in error here, filed a special plea, denying that he owned, used or controlled the automobile at the time in question.

The evidence tended to show, without contradiction, that the sole occupant of the automobile was the driver, one Nick Mohara, co-defendant, who, however, at the close of plaintiff's evidence was dismissed from the case upon motion of the plaintiff.

The negligence of the driver is not denied, and the only questions raised here arise out of defendant McDonald's special plea. He made a motion for a directed verdict at the close of the plaintiff's evidence and afterwards at the close of all the evidence, both of which motions were denied, as was also a request for an instruction to find him not guilty, and these rulings of the court are assigned for error.

There is little dispute as to the facts. The defend-

NEVADA STANLEY,
Defendant in Error,

vs.

E. K. BROCKWAY,
Plaintiff in Error.

MR. JUSTICE McKENNA DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $7000 entered in favor of the plaintiff on the verdict of a jury in an action on the case for negligence, motions for a new trial and in arrest of judgment being overruled.

The suit was brought against the defendants, and the declaration alleged that their defendants owned, controlled, operated and managed an automobile which they driven, driven and managed over the intersection with Tenth Street, and that they drove it so negligently that it struck the plaintiff, to her great injury.

The testimony, taken, the in plaintiff's in error behalf, filed a special plea, denying that he owned, nor at any time controlled the automobile at the time in question.

The evidence tended to show, without contradiction, that the sole occupant of the automobile was the driver, and a Negroe, co-defendant, who, however, at the close of plaintiff's evidence was dismissed from the case upon motion of the plaintiff.

The negligence of the driver is not denied, but the only questions raised here arise out of defendant Brockway's special plea. He made a motion for a directed verdict at the close of the plaintiff's evidence and afterwards at the close of all the evidence, both of which motions were denied. He has also a request for an instruction to find him not guilty, but these rulings of the court are confined for error.

There is little dispute as to the facts. The defendant

ant, McDonald, was at the time in question and for many years had been, superintendent of streets in the eighteenth ward of the City of Chicago. He owned the automobile which was being driven by Mohara at the time of the accident. It was a two passenger Marmon which he had purchased about two years prior to the accident. He used the machine, in part at least, in the performance of his duties as ward superintendent.

Nicholas Mohara was a city employe who was under civil service but was working for the City under the direction of McDonald. One John J. O'Malley, a timekeeper, also employed by the City, seems to have worked under McDonald's directions. McDonald used the machine in doing his work as superintendent, and his testimony is to the effect that he usually drove it himself. The accident occurred July 3, 1918.

Mohara was an expert mechanic and was also a licensed chauffeur. McDonald kept the automobile at the yards of the street department in the eighteenth ward, which was located at Racine and Adams streets, and maintained there by the City. He testifies (and his testimony is not contradicted) that on the day in question he returned to the ward headquarters or yard at about four o'clock, and that when he arrived there he learned that his wife was very sick; that he turned the machine around; that the timekeeper, O'Malley, was standing in the doorway and he, defendant, said, "If you are going west I will drive you west." O'Malley and Mohara then got in the machine and defendant drove west to his home, got out of the car and went into his residence. He then said to Mohara, "Drive John O'Malley home and then take the machine back to the yard." The yard was located at 208 South Racine avenue, which was about three and one-half miles from the residence of McDonald. O'Malley lived on Harrison street east of Homan avenue, at number 145, several miles west of the eighteenth ward yard, and

ent, McDonald, was at the also in question and for many years had been, superintendent of streets in the eighteenth ward of the city of Chicago. He owned the automobile which was being driven by Adams at the time of the accident. It was a two passenger Ford which he had purchased about ten years after in the auction. He used the machine, in part at least, in the performance of his duties as ward superintendent.

Nicholas Adams was a city employee who had been with service but was working for the city under the direction of McDonald. One John G. O'Malley, a lamplighter, also employed by the city, was in the service of McDonald's department. Adams used the machine in doing his work as superintendent, and his reason why it is the effect that he usually drove it himself. The accident occurred July 7, 1913.

Adams was in sound health and was fifty a diseased drunkard. McDonald kept the automobile at the yards of the street department in the eighteenth ward, which was located at Halsted and Adams streets, and maintained them by the city. The testimony of his testimony is not contradicted that on the day in question he returned to the ward headquarters at about four o'clock, and that when he arrived there he learned that his wife was very sick; that he turned the machine over; that the chauffeur, O'Malley, was standing in the doorway and he, McDonald, said, "If you are going home I will drive you home." O'Malley and Adams then got in the machine and McDonald drove away in his home, got out of the car and went into his residence. It does not in evidence, "drive the O'Malley home and then left the chauffeur in the yard." The yard was located at 501 South Halsted street, which was about three and one-half miles from the residence of McDonald. O'Malley lived on Carolina street near of Sixty street, at number 140, several miles west of the eighteenth ward yard, and

about a mile southeast of McDonald's residence.

McDonald next heard of his car when at about seven o'clock the same evening he was called up by a police station on the west side of LaSalle street. He aided in getting Mohara out on bond.

From the intersection of State street and Jackson boulevard where the accident occurred is a little more than a mile and a half west to Racine and Adams streets, where the eighteenth ward yard is located.

Mohara had on other occasions ridden about with the defendant, McDonald, in his car, doing work about the yard, and if the business required McDonald would entrust the car to Mohara's keeping to return it to the yard, but Mohara was never employed personally by McDonald at any time. McDonald had been making use of Mohara to drive the machine for about a year, part of the time once or twice a week. Mohara would drive the car when it was necessary for McDonald to be away at the City Hall, and at such times McDonald would drive the car to Canal street and Mohara would take it back from Canal street to the yard. Mohara also did repair work on the car, but he never drove the car when McDonald was in it. McDonald says:

> "The only purpose I used him for was to return the car to its proper place, which was done sometimes two or three times a week. I do not know of my own knowledge that he always did just as I told him to. I gave the directions what to do. When I returned to the yard the car would be there and no questions asked as to leaving the matter of driving and perhaps of route of driving to his discretion to exercise as he drove home; such is not always the case. In this particular case I told him just what to do; I did not tell him just what particular route to take."

McDonald further testified that when he went home with his car he was not going out on any errand for the City, but on personal business, and that when Mohara was driving the car to the yard he was not performing any duty for the City; that he never used

Mohara at any time except at working hours; that Mohara never drove the car in the evening or early morning; that the car was kept in the city yard and never used in the evenings unless work was being done.

The controlling question in the case is, of course, whether the doctrine of respondeat superior is applicable to the facts of this case. The law applicable has been stated in Johnson v. William Johnston Printing Co., 263 Ill., 238, and in many other cases following that decision. It is there held in substance that in order to make a master liable in such cases it is necessary to show that the tort feasor was the servant of the defendant; that this relationship existed at the time of the injury; and that such relationship existed with respect to the particular transaction out of which the tort in question arose.

The defendant argues that the relationship of master and servant did not exist between McDonald and Mohara at the time of the alleged tort; but whether that technical relationship actually existed we do not think it necessary to decide. Mohara was not the servant of the City and he was driving the car of McDonald at the suggestion and request of McDonald. The uncontradicted evidence tends to show, however, that instructions were given to him which limited his agency. He was to do two things, - he was to take O'Malley home and he was to take the automobile back to the yard. While performing these duties and confining himself to them, we have no doubt he was the agent in respect to these matters of McDonald, and that for negligence on his part McDonald would be responsible.

The evidence is not as clear and complete as might be wished with reference to the route which Mohara took, but it does clearly and without contradiction tend to show that he was not performing at the time in question any one of the duties

Sphere of our view except at waiting hours; that notice never gives the act to the auditor or early morning; that he was the last in the city proof and never used in the evening unless work was being done.

The controlling question in the case is, of course, whether the doctrine of *proximate* *consequence* is applicable to the facts of this case. The law applicable has been stated in *Johnson* v. *Milling Industries Inc.*, 345 Ill., 246, and in many other cases following that decision. It is there held in substance that in order to make a master liable for some cause it is necessary to show that the fact (here the arrival of the injured; that this unlawfully assisted at the time of the injury; and that such unlawfully acted with reckless in the particular transaction out of which the injury in question arose.

The defendant argues that the relationship of master and servant did not exist between Ostrowski and Johnson at the time of the injured lady; but whether that relationship unlawfully existed we do not think it necessary to decide. Johnson was not the servant of the City and he was driving the car of Ostrowski at the request of the and owner of Ostrowski. The evidence established evidence tends to show, however, that instructions were given to him which limited his agency. He was to do the things, - he was to take Ostrowski home and he was to take the necessary care in the part. While performing these duties and motoring himself in them, he have no right to go in the space to those matters of Ostrowski, nor that he appointing on his part Ostrowski would be responsible.

The evidence in now be state not indicate an right be which his servants in the case which occurs, but it does clearly and without contradiction tend to show that he was not performing in the line in question any one of the duties

which McDonald committed to him. He had taken O'Malley home. He was not returning the car to the yard, but on the contrary was dirving it in a directly opposite direction. True, the evidence does not show that McDonald told Mehara the exact route by which he was to return the car to the yard, but it is fair to presume that he did not intend that he should reach the yard by driving it in exactly the opposite direction. The evidence shows without contradiction that Mehara deviated from the scope of his employment. He was told to drive to the yard, but he was driving away from it. Meelan v. Guggenheim, 210 Ill. App. 1 is a case upon which the plaintiff relies and which, so far as we are aware, goes farther than any other case in the direction of holding the master or employer liable upon a state of facts such as is made to here appear. In that case the doctrine was held applicable and the employer liable, but at the time of the accident the machine was being taken to the garage where the employer had specifically directed it should be taken. While it may be true, as plaintiff contends, that a prima facie case of liability is made out by showing the ownership of the automobile in the defendant, employment of the servant to operate it and its operation by the servant, nevertheless that prima facie case is here overcome by uncontradicted evidence.

The evidence being insufficient to sustain the verdict, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

40 - 29119

4074

R. H. McPHERRON,
Defendant in Error,

vs.

THOMAS HEGAN,
Plaintiff in Error.

225 I.A. 615

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant in the trial court has sued out this writ of error to review the record in a case wherein the plaintiff obtained a judgment by default in the sum of $83.80 on the 30th of August, 1923, before Judge Adams of the Municipal court of Chicago on account of a claim of the fourth class in tort. The record shows that on September 28, 1923, thereafter, defendant made a motion supported by affidavit to vacate the judgment and for leave to defend, which motion was denied.

October 15, 1923, more than thirty days after the rendition of the judgment, the defendant filed in the Municipal court his petition setting forth in haec verba praecipe, statement of claim and summons which had been served upon him, and alleging that neither specified the return day of the summons nor did the summons show the date issued by the clerk of the court; that on that account the copies were mislaid until on or about September 19, 1923. He further alleged in his petition that he had a good defense to the suit on the merits, specifying the particulars. On the same day Judge Bugee of the Municipal court entered an order that the matter be set down for hearing, and on October 26, 1923, an order was entered by Judge Bugee giving defendant leave to appear and defend and demand trial by jury, the judgment to stand as security and affidavit of merits to be filed in fifteen days and execution stayed. Thereafter defendant, by leave of

court, filed a demand for trial by jury. On October 29, 1923, Judge Adams on motion of the plaintiff ordered that the orders of October 14, 22 and 26 be vacated and set aside, and that the defendant's appearance and jury demand should be stricken from the files, and that execution should issue.

November 8, 1923, pursuant to due notice given the defendant moved before Judge Adams that the order of October 29th should be vacated, which motion was overruled; and on November 9th Judge Adams ordered that a citation issue out of the court against defendant, requiring him to attend before the court at eleven o'clock a. m. on November 14, 1923, and at such other times as might be required to be examined concerning the property of the judgment debtor, and to abide the further order of the court.

Error is assigned that Judge Adams denied the motion of defendant to vacate the judgment, in vacating the orders of Judge Huges and in striking the appearance and jury demand of defendant from the files, also in ordering execution to issue and in refusing the motion of defendant to vacate and set aside his order.

The plaintiff has not appeared in this court to defend the record. Paragraph 376 of chapter 37 of the Illinois statute (See Smith-Hurd's Rev. Stat. 1923) provides in substance that an order or decree of the Municipal courtmay be vacated, set aside or modified within thirty days after the entry of such judgment,order or decree, but that if no motion to vacate, set aside or modify any such judgment,order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified except upon appeal or writ of error or by a bill of equity or by petition to said Municipal court setting forth the grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated,

set aside or modified by a bill in equity.

It is apparent that Judge Bugee in entering an order after the expiration of thirty days from the date of the entry of judgment was proceeding under this section of the statute. We also think it is apparent that his order setting aside the judgment upon terms and giving to defendant the right to have the issues tried by a jury, was not thereafter subject to review by Judge Adams.

The orders of October 29, November 8, and November 9, entered by Judge Adams being erroneous will be reversed and the cause remanded for trial.

REVERSED AND REMANDED.

McBurcly, P. J., and Johnston, J., concur.

47 - 29129

40756

235 I.A. 615

ERROR TO SUPERIOR COURT OF COOK COUNTY.

PEOPLE ex rel. JOHN O'ROURKE,
Defendant in Error,

vs.

WILLIAM W. LeGROS, FRANK C. WEBER, ELMER C. BYE, PETER J. LYNCH, PATRICK DEVOY, as Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago,
Plaintiffs in Error.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The relator filed his petition in the Superior court of Cook county on July 18, 1922. In this petition he sets up that the City of Chicago is a municipal corporation of more than two hundred thousand inhabitants; that the relator was on June 7, 1894, duly appointed to the office of police patrolman of the City of Chicago, served as such patrolman to and including June 30, 1912, when he resigned and made an application or petition for pension to the trustees of the Police Pension Fund of the City of Chicago, which pension was allowed in the sum of $55 a month and which amount has been paid to him ever since June 30, 1922; that the salary for the rank of patrolman is fixed by the annual appropriation bill of the City of Chicago, and that on, to-wit, the 31st day of March in each of the years 1913 to 1923, the said City of Chicago has duly appropriated by its annual appropriation bill passed by the City of Chicago and approved by the Mayor, in and by which appropriation the office or position of patrolman was appropriated for in 1913 to 1918, inclusive, $1,500 per annum; for the year 1919, $1,800 per annum; for the years 1920 to 1923, inclusive, $2000 per annum; which salaries have always been payable in equal monthly installments; that the relator had reached the age of fifty years and had served more than twenty years when [illegible] that he has been entitled to a pen-

sion from the defendants in the sum equal to half of the salary appropriated each year for the office of patrolman as aforesaid, but that the defendants wrongfully insisted that he was entitled only to one-half the salary as appropriated for the year during which he retired. He alleged that there is now due from respondents to him for back pension the sum of $1989, and that there should be paid by respondents to relator in the future one-half of whatever salary may be appropriated for the office of patrolman in the future and for the balance of the year 1923, at the rate of $83.33, being one-half of said amount. Petitioner prays that a writ of mandamus be directed to the Retirement Board and its members, commanding them to pay forthwith. A general demurrer was interposed to this petition, and the court upon hearing thereof overruled the demurrer and ordered that the writ issue as prayed and that petitioner have and recover his costs to be taxed by the clerk, the respondents having elected to stand by their demurrer.

The controlling question in this case is the same as that recently passed upon by this court in the case of John J. O'Neill v. George F. Harding et al., No. 29021. The views of this court are expressed in an opinion by Mr. Justice Johnston filed June 30, 1924. In conformity with the views therein expressed the judgment here will be reversed, and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

to relator

63 - 29149

MARTHA A. WILLIAMS,
Appellee,

vs.

BALDWIN PIANO COMPANY,
Appellant.

235 I.A. 616

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $300 entered in favor of the plaintiff upon the verdict of a jury for the plaintiff in the sum of $395, the court requiring a remittitur of $95, which was entered.

The second amended statement of claim averred that in consideration that plaintiff at the request of defendant would buy a certain piano at the price of $350 on terms of $250 cash and an old piano, the defendant promised expressly and expressly warranted that the piano would be put in perfect mechanical condition, that the age of the piano did not exceed eighteen years, and that the keys would not block and the piano would have an even sequence in tone; that plaintiff, confiding in these promises, bought the piano, paying cash and the old piano, but that the defendant did not regard its promises and warranties; that the piano was fifty-two years old, not in good mechanical condition, did not have an even sequence of tone, that its keys blocked, and that plaintiff had been put to great charges and expense in taking care of it.

The statement further avers that plaintiff immediately notified defendant of these defects in the piano and requested defendant to return the $350 to the plaintiff.

The affidavit of merits denied that defendant had made representations as averred, but says that the piano was sold to

plaintiff as a used piano without reputation as to age or condition; further denies that the piano was in a defective mechanical condition; denies that it made any false representations in the matter, and denies that plaintiff has been damaged or that plaintiff is entitled to recover any sum of money whatever because of the transaction. It further avers that there has been no rescision of the contract and that the plaintiff is still in possession of the piano.

The brief and argument of the defendant in this case lays down a large number of propositions of law with citations of authority in support thereof, such as that representations which merely express an opinion, belief or judgment do not constitute a warranty; that there is no warranty when the defects of an article are known to the buyer or where the buyer has knowledge of facts sufficient to put him on inquiry or to charge him with notice or equal opportunity with the seller to discover defects; that there is no warranty of quality or fitness for the purpose intended where the buyer inspects or has the opportunity of inspection; that a buyer is estopped to rescind if he fails to return the goods after discovery of the defect or uses them or otherwise deals with the property as his own. It also urges that the statement of claim does not state facts sufficient to constitute fraud; and that there is no evidence to prove fraud against the defendant.

All these propositions are beside the point, the fact being that the statement of claim alleges and the evidence for plaintiff tended to show that the defendant sold to plaintiff a piano which was known to have defects which the defendant, as vendor, <u>promised it would remedy</u>, the evidence tending to further show that defendant did not keep its promise in this regard, and, further, that the piano which was delivered to the plaintiff was wholly useless. There was evidence tending to support the alle-

gations of both plaintiff and defendant in these respects submitted to the jury, and it is not argued here that the verdict of the jury is against the manifest weight of the evidence.

The defendant argues, however, that there is no evidence tending to prove what damages, if any, were sustained by the plaintiff, but the record does not sustain this contention.

The evidence for plaintiff tends to show that the piano is worthless and the uncontradicted evidence is that plaintiff paid to defendant therefor $250 in cash and also gave her old piano, for which she was allowed a credit of $100.

Section 72 of chap. 121A of Ill. Rev. Statutes, Cahill, 1923, provides that where there is a breach of warranty by the seller, the buyer may at his election accept or keep the goods and maintain an action against the seller for damages, may rescind the contract to sell or the sale, and refuse to receive the goods; or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. The evidence here shows (and it is uncontradicted) that the plaintiff offered to return the piano to the seller. This section of the statute is controlling, and the question of whether the plaintiff was entitled to recover under the law as therein declared was fairly submitted to the jury.

The testimony of plaintiff is severely commented upon, but there was evidence aside from her own from which the jury might well conclude that the piano delivered was worthless. It was apparently fifty-two years old, as the evidence indicated, and had undoubtedly well served its day and generation.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

63 -38149

MARTHA A. WILLIAMS,
Appellee,

vs.

BALDWIN PIANO COMPANY,
Appellant.

235 L.A. 616

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED AN ADDITIONAL OPINION
UPON PETITION FOR REHEARING.

The defendant company in this case has filed a petition for rehearing, in which it is urged that there was no breach of warranty in this case because the "plaintiff not only knew the defects complained of, but admits that she discovered them herself, being an accomplished musician, and her only complaint against defendant is for failure to repair or remedy known defects." In the course of a somewhat extended questionaire we are asked: "Can there be a breach of warranty against known defects?"

It is apparent that defendant has overlooked testimony in the additional abstract of the record submitted by the plaintiff.

It appears from this the plaintiff testified that the salesman for the piano company told her if she would purchase the piano, the company would put it in first-class condition, and the overhauling would be done in defendant's own rooms; that she then told the salesman she would buy the piano if he would fix it up in first-class condition <u>before it was delivered</u>.

The jury could, therefore, reasonably infer from the evidence that, at the time the piano was delivered, the plaintiff did not know of its defects, but, on the contrary, relied upon the representation of the defendant that it had been put in good condition. The case is, therefore, clearly distinguishable from

these cases which plaintiff cites and on which it relies. There was therefore a breach of warranty.

The amount allowed as damages is complained of, but plaintiff was clearly entitled to the return of her money with interest and also to receive the value of her piano, which the evidence shows defendant placed at $100. The judgment entered is for much less than these amounts.

The defendant complains that, as the case now stands, plaintiff has the piano purchased from the defendant and also a judgment against the defendant. It urges there is no law which will permit this. It is suggested the piano "may have been valuable as an antique or curio." Perhaps, but there is no evidence bearing on that point. The question is not before us on this record.

The petition for rehearing will be denied.

REHEARING DENIED.

McSurely, P. J., and Johnston, J., concur.

74 - 29161

235 I.A. 616

FRANCIS REIDLER,
Appellant,

vs.

L. D. LEACH & COMPANY,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment in favor of the defendant, entered upon the verdict of a jury. At the close of the evidence each of the parties made a motion for an instructed verdict, which was in each case denied and motions for a new trial and in arrest of judgment by the plaintiff were overruled. Plaintiff's statement of claim alleged that on March 9, 1920, plaintiff had leased certain premises to the defendant by a written lease at a monthly rental of $400 a month for a term beginning May 1, 1920, and ending April 30, 1921; that the defendant failed to vacate and surrender the premises on or before April 30, 1921, and retained possession and occupancy after that date, whereby the lease was extended for an additional period of one year at the same rate and on the same terms as the original lease; that defendant paid to plaintiff $400 only, being rent for the month of May, 1921, but failed to pay the rent due thereafter, amounting to a total sum of $3,600.

The affidavit of merits averred that defendant's lease expired June 30, 1921, and that it was never extended or renewed; denied that defendant owed the amount sued for; admitted that defendant did retain occupancy for a part of the

premises and during a part of the month of May, 1921, "but such occupancy was in accordance with an oral understanding and agreement had and entered into prior to April 30, 1921, by and between plaintiff and defendant, in substance and effect that the defendant could retain such occupancy until defendant had completed the removal of its lumber from said premises, and that such possession and occupancy would be at the same rate of rental as fixed in the lease, for and during the time required for such removal; that such removal of said lumber was commenced with the full knowledge of the plaintiff prior to April 30, 1921, and about April 10, 1921, and was completed a short time thereafter and before May 31, 1921; that there was no intention on the part of defendant or plaintiff to extend or renew said lease, and that the only possession and occupancy of the defendant was in accordance with and in pursuance of the said understanding and agreement entered into by and between plaintiff and defendant prior to April 30, 1921, which possession and occupancy wholly ended prior to May 31, 1921." The affidavit of merits also averred that plaintiff accepted from defendant a payment of $400 on May 20, 1921, in full and final settlement and satisfaction of all obligations for rent in connection with the premises; averred that the defendant had not occupied any part of the premises since the removal of its lumber was completed in May, 1921; that plaintiff had control, use and possession of the premises since that time; and that plaintiff did not exercise reasonable diligence to re-rent the premises after the vacation thereof by defendant; that the lease expired April 30, 1921, and never was renewed or extended for any period expressly or impliedly.

The evidence offered in plaintiff's behalf tended to show the execution of the lease between the parties for the premises in question to be used for a lumber and coal yard from May 1,

1920, to April 30, 1921, at a rental of $400 a month, payable in advance; that after the making of the lease the defendant went into possession of the property, which was used as a lumber and piling yard and continued in possession during the year and paid rent as provided for by the lease. The evidence also tended to show that the defendant did not vacate the premises on or before the termination of the lease, but continued in possession of the same during the greater part of the month of May, 1921; and that on May 20, 1921, defendant sent by mail to plaintiff a check of that date to his order for the sum of $400, which was stated to be for rent for the premises in question; that no more rent was paid thereafter, and that the property remained vacant thereafter; that bills were rendered for rent from time to time thereafter by plaintiff at the rate of $400 a month, which bills were returned. The evidence also tended to show that the plaintiff, during this time, was an invalid and confined to his bed, and that one Stevenson, his secretary, acted in his behalf in transactions with the defendant. It also appears from the evidence that some time in April, 1921, prior to the expiration of the lease, negotiations were entered into looking to the execution of another lease; that defendant in these negotiations was represented by its president, Mr. Leach, and its vice-president, Mr. Witherall; that thereafter on April 13, 1921, Mr. Stevenson, as secretary, wrote to defendant stating that the conversation had been mentioned by him to the plaintiff, and that he had informed plaintiff of defendant's suggestion that defendant might have the privilege of keeping its property on the premises until it was disposed of to some one else; and that he, Stevenson, had made a proposition to defendant that this might be done for the sum of $200 a month, which defendant had declined. He added: "In connection with this latter point Mr. Beidler has always had sort of definite views,

and he said that he regretted that I had made any such proposition because he did not think it was satisfactory to either party. We have always found that if we have property for rent it must be actually vacant to be inquired for if there is property on there, there is not near the likelihood of inquiry for it. Furthermore, such an arrangement he never considers as satisfactory anyhow."

Therefore we make the following definite proposition:

"1. We will rent you the property you now occupy for another year from May 1, 1921, at $5,400 a year.

"2. We will proceed as quickly as the Great Lakes Dredge & Dock Company can do so, to reconstruct the slip dock in first class shape, you of course to give us access to the property and sufficient clearance for the Great Lakes to do whatever work is necessary.

"3. I do not see that there is any point to his suggestion in connection with a lease after this year because there is no assurance that we could then agree on terms; and therefore in order to make something tangible, I will on my own hook agree to rebuild the river dock for you next year providing you now agree to enter into a lease for three years from May 1, 1921, at a rental of $5,400 a year.

"If you are interested in taking up this matter or any more information, I can call and see you with the Great Lakes' proposition and the blue prints to explain more in detail just what will be done."

On April 16th defendant replied, stating that it had already arranged to move its yard, as the price asked was prohibitive, and adding:

"We will start in the first of the week actively removing the lumber and get all of it out of there just as soon as possible. Will probably have to avail ourselves of your $200 per month proposition for a month or two but we are not going to sell the lumber from the yard and are going to transfer it as fast as possible."

On April 18th plaintiff, by his secretary, replied:

"I am hastening to reply by registered mail to your letter of the 16th. In my letter of the 13th I advised you that Mr. Beidler did not approve of the proposition I made you of $200 per month hold-over and which proposition Mr. Leach denounced and declined. Mr. Beidler does not approve of my ever having made the proposition and is glad it was declined because he does not believe such an arrangement is satisfactory between either party. If you will read my letter of the 13th again, you will observe that this is clearly stated therein. So that there can be no question between us however, beg to advise that we have no proposition or understanding with you for any arrangement after the termination of our lease together on April 30th for the property you now occupy."

The vice-president of the defendant testifies that soon after the receipt of this letter of April 18th, he called Mr. Stevenson on the telephone at least twice; that it must have been in April because it was just a short time before the first of May; that he had received a letter from Mr. Stevenson and called him up. He says:

> "I told him (Mr. Stevenson) that I thought that -- over the telephone, that in view of his proposition to allow us to stay for the $200 he ought to allow us to stay that way, it was so late then it would be impossible for us to get our lumber out of there before the first of May, and he said that Mr. Beidler would not do that, and I told him then that we would pay him $400 per month for the time that we remained in in the yard after that time, and he said all right, he thought he could fix that up with Mr. Beidler all right, and that we -- I never heard from him between that time and the 1st of May that he couldn't fix it up with Mr. Beidler all right. I had no other conversation with him between that time and the 1st of May regarding this lease."

On cross-examination he stated that this telephone conversation might have been on the same day he received the letter of April 18th or it might have been a week later; that it was as soon as he could get in touch; that the witness called Mr. Stevenson up and asked him about the $200 proposition, and that that was what he had in mind entirely, but that when he, Stevenson, said that Mr. Beidler would not agree to that he then told him that for the length of time defendant would stay there, it would pay him the rent of $400 which was then being paid, and that Stevenson replied that "he thought Mr. Beidler would agree to that." Mr. Stevenson, called as a witness, denied that any such conversation ever took place, and the plaintiff argues here that the evidence, even if believed, is wholly insufficient as a matter of law to establish the existence of a new agreement. He invokes the well settled rule of law that in the absence of proof of a special agreement for a shorter term, a tenant who holds over and pays rent is presumed as a matter of law, in case the landlord so elects, to have assented to a renewal of the lease for a term of one year. He calls

have assembled to

attention to the fact that in this view of the law the actual intention of the tenant either to renew or not to renew the lease is immaterial. In the absence of a special agreement the law fixes his liability independent of his intention. We think the proposition of law as stated is well settled by the decisions of the courts of this and other states. Clinton Wire Cloth Co. v. Gardner, 99 Ill. 155; Weber v. Powers, 213 Ill., 370; Goldsbrough v. Gable, 152 Ill., 594; Barbee v. Evans, 230 Ill. App. 154; Conway v. Starkweather, 1 Denio, 113; Schuyler v. Smith, 51 N. Y. 309. The position of the defendant is that the testimony of defendant's vice-president to the oral conversation made an issue of fact as to the existence of a new agreement, which has been settled in its favor by the verdict of the jury; and it further contends that the acceptance of the check of May 20th amounted under the circumstances to an accord and satisfaction which would at any rate preclude a recovery by the plaintiff. In support of this last contention defendant cites Prince v. Waller, general number 23557, (opinion of this court filed December 10, 1923) and Harlow v. Kiederman, general number 23441 (opinion of this court filed November 27, 1923), neither of which has as yet been reported. The opinions cited, however, do not sustain the defendant's contention, and this for the obvious reason that under the evidence here there was, at the time this payment was made, no dispute between the parties; that the amount of the check was at that time actually due.

It is true that the check was accompanied by a letter from the defendant stating that it would not, in its opinion, thereafter be liable for rent, but the acceptance of the check was not in any respect made conditional upon acquiescence of the plaintiff in this view. As we have already suggested, plaintiff contends that the testimony of defendant's vice-president was wholly insufficient to establish the fact of a new agreement. However, in view of the

conclusion at which we have arrived, which will make necessary another trial of the case, we will express no opinion on the weight of the testimony.

At the request of the defendant the courtinstructed the jury as follows: "The jury are instructed that if you find for the plaintiff in this case, his measure of damages is the amount provided in the lease less whatever the plaintiff could have made from the re-renting of said premises by the use of diligence after the premises came into his possession." We think it cannot be seriously contended that this instruction as applied to the facts of this case is correct. Arguing that the instruction was proper, the defendant cites Resser v. Corwin, 72 Ill. App. 625; McCormick v. Loomis, 165 Ill. App. 214; and West Side Auction House Co. v. Connecticut Mutual Life Insurance Co., 186 Ill. 156. Each of these cases is, however, clearly distinguishable from the instant one, in that in these, unlike this case, after the premises were abandoned by the tenant the lessor took and held possession thereof. In such case the law as announced in the instruction might be applicable.

As we understand the law, where a tenant wrongfully abandons the premises the landlord may either re-enter and terminate the lease and sue for and recover the rent due at the time of the tenant's abandonment, or he may leave the premises vacant and sue for the entire rent, or he may give notice of refusal to accept the surrender of the premises and sub-let for the tenant, using due diligence. (See Higgins v. Street, 92 Pac. 153, 19 Okla. 45.) The evidence here uncontradicted tends to show that the plaintiff elected to leave the premises vacant and sue for the rent. Under these circumstances the instruction as given must have been confusing to the jury and therefore prejudicial to the plaintiff. It is strongly argued in behalf of the defendant that since the jury found for the defendant on the issue as to whether there was a new agreement, it did not have to consider the question of damages at all, and there-

fore the plaintiff was not injured. Under some circumstances this would undoubtedly be true, as the cases cited by the defendant show; but we are of the opinion that under the evidence in this case this instruction was well designed to cause a jury to infer that it was the duty of the plaintiff to re-enter and re-let the premises. Such, as we have shown, is not the law and we therefore are unable to say that the jury was not misled.

For the error in giving this instruction the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McDurely, P. J., and Johnston, J., concur.

102 - 29190

WILLIAM H. BROWN,
Appellee,

vs.

HOTEL LA SALLE COMPANY,
a Corporation, et al.,
Appellants.

235 I.A. 616

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant, Hotel LaSalle Company, appeals from a judgment in the sum of $25,000 entered upon the verdict of a jury, motions for a new trial and in arrest of judgment having been over ruled. The action was in case for negligence through which plaintiff sustained serious personal injuries. There were two defendants in the trial court - the Hotel LaSalle Company, the owner of a cab which was struck in the rear by a four-passenger Hudson coupe, and Henry L. Baumgardner, the owner of the coupe, who was driving it at the time of the accident. The jury by its verdict found the defendant Baumgardner not guilty.

The accident in question occurred at about 1:30 a.m. on the morning of September 29, 1920, on the east side of Michigan avenue (a street running north and south in the city of Chicago) and about 175 feet north of the intersection of that street with Twenty-fifth street, which extends in an easterly and westerly direction.

At the time in question plaintiff was a passenger in the Hudson coupe at the invitation of Baumgardner, and received injuries the seriousness of which is not questioned. There is no contention that the damages allowed by the jury are excessive.

The evidence tends to show without contradiction that at the time in question Michigan avenue was well lighted, - "the

best lighted street in Chicago" the witnesses say; that it was dry, and that the bulk of the travel was then moving towards the south and on the west side of the street, travellers who had been down town and at other places then returning homeward.

Plaintiff was a young man twenty-five years of age and unmarried. He was visiting in Chicago with his parents, who lived in the western part of the city. On the evening of the preceding day he met a friend named Chamberlain at the Illinois Athletic Club, where they dined; from there plaintiff and Chamberlain went to the Illinois theater, where they met plaintiff's father. Chamberlain also lived in the western part of the city. He used a Ford roadster as a means of conveyance, and after the performance at the theater started home with plaintiff. On the way they decided to stop at a cafe known as the Arsenia, a resort on the near west side of the city with a reputation not of the best but which they had visited on prior occasions. After about half an hour the co-defendant, Baumgardner, who was acquainted with plaintiff and Chamberlain, entered this place with two ladies who were introduced to plaintiff and with each of whom he danced. The three men testify that although liquor was sold in this place they did not indulge while there, and that neither they nor any one of them was in any wise under the influence of liquor at the time of or just before the accident.

The ladies lived on Michigan avenue near 47th street on the South side of the city. Mr. Baumgardner then lived with his family, consisting of his wife and three children, in Riverside, a suburb about ten miles west of Chicago. Mrs. Baumgardner has since that time obtained a divorce.

It was decided that plaintiff and Chamberlain would leave the Ford car at the Arsenia and accompany Mr. Baumgardner and his lady friends (whose names are not disclosed) to their

homes. They did so, and while on the return journey, driving north on Michigan avenue upon the east side of the street the accident befell them, and plaintiff was severely injured.

The first count of plaintiff's declaration charges that defendants were guilty of general negligence causing the collision. In the other counts negligence was alleged in that the defendant Hotel LaSalle Company suddenly brought its cab to a stop without warning after negligently driving into the path of the Hudson. The eye-witnesses were the plaintiff Mr. Chamberlain, Mr. Baumgardner, Ben Simon, a driver for the Checker Taxi Cab Company, who had followed the Hotel LaSalle cab all the way from Thirtieth street until it was struck, Fred J. Peterson, the driver of the Hotel LaSalle cab which was struck, Arthur Brown, a night watchman for the Rue Motor Car Co. at their offices at 2441-43 Michigan avenue, who heard the crash at the time of the collision, and Joseph Conway, a chauffeur of a second Hotel La Salle cab which was parked on the east side of Michigan avenue, and alongside of which the other Hotel LaSalle cab had moved at the time of the collision.

At this time Michigan avenue between 24th and 25th streets was fifty feet from curb to curb and from the east curb to the east building line of the avenue was fifteen feet. Twenty-fifth street was 42 feet from curb to curb at Michigan avenue and from the curb line to the building line of 25th street was about 12 feet. The Hotel LaSalle cab which was struck weighed about 3400 pounds, and the Hudson coupe which struck it was about 300 pounds heavier. The evidence tends to show that at the time of the collision the Hudson coupe was being driven a little faster than thirty miles an hour. Photographs of the damaged Hotel La Salle taxicab are in evidence, and they tend to show that it was struck almost squarely in the rear. The force of the impact drove

it forward 100 feet more or less. It was an inclosed cab with a glass in the rear about two by four feet in size. In the collision the gas tank was smashed and the car took fire. The Hudson coupe seems to have turned somewhat to the right after the collision and ran into the display rooms of the Rue Motor Company situated on the east side of the street, the impact smashing the plate glass front.

A police squad appeared upon the scene and plaintiff was removed to the Wesley hospital where his injuries were treated. Mr. Petersen, the driver of the LaSalle hotel cab which was run into, caused the arrest of Mr. Baumgardner upon the charge of driving an automobile while intoxicated and also caused the arrest of Mr. Chamberlain on a charge of disorderly conduct. Upon the trial of those cases they were found not guilty.

The injuries of the plaintiff were such that he almost immediately became unconscious and remained so for several hours after the accident.

On the trial in the Municipal court Chamberlain testified; "We didn't notice the cab until we were right on it, and I saw the rear tire." He further stated that at that time the plaintiff was lighting a cigarette; that he had a match lighted and that the light reflected in the closed car and it was very hard to see. In the trial of the present case he states that this was false testimony; that plaintiff was not lighting a cigarette at the time of the accident, and that the match light reflection on the glass of the windows did not obscure his vision of the road ahead; that this false testimony was given at the request of defendant Baumgardner, who gave as a reason for his request that he did not want his wife to know about the matter. Mr. Chamberlain further testified in the Municipal court that he was at Tierney's cafe instead of the Arcania

on the previous evening and that there were no women in the party. Tierney's cafe was at that time located at 35th street and Grand boulevard. Mr. Chamberlain says this false evidence was also given at the request of Mr. Baumgardner and for his own purposes; that Mr. Baumgardner told him to say that Mr. Brown was lighting the match and that it obscured his vision. At the former trial of this case in the Superior court Chamberlain testified that he did not notice the Hotel LaSalle cab with which they collided until he was right on it and saw the rear tire.

The trial in the Municipal court took place about a month after the accident, and at that time Baumgardner testified that he didn't see the car in front of him until he struck it; that it was in front of him about five or six feet, right directly ahead of him, and that at the time he saw it, it had stopped all of a sudden; that the driver of the LaSalle cab did not give any signal to his knowledge. Upon the former trial of this case in the Superior court, Mr. Baumgardner testified that all of a sudden this Hotel LaSalle cab loomed right up in front of him.

The uncontradicted evidence tends to show that, going at the rate of thirty miles an hour, the Hudson car could have been stopped at a distance of about twenty-five feet. Upon the last trial of this case the plaintiff testified that he noticed the LaSalle cab possibly two blocks south of the accident; that he first noticed that they were following the car rather closely; that he noticed it because they were following rather closely behind it - a matter of thirty or thirty-five feet; that the cab was going about the same rate of speed as the coupe; that there were cars ahead, and that all the traffic was going at about the same speed - the witness did not believe over thirty miles an hour; that when they came to 25th street the cab was still ahead and in

about the same relative position; that after crossing 25th street they were going about the same rate of speed, and that he, plaintiff, was just leaning over and resting his elbows on his knees, smoking a cigarette and talking to Chamberlain and just watching out of the front while talking, paying no particular attention to the cab; that he just knew it was there; that possibly 100 or 150 feet north of 25th street the cab suddenly turned in and slowed down fast, "suddenly stopped is the way I would say it, and at first I paid no particular attention;" that he, plaintiff, had no sense of danger until they were practically within fifteen feet of the cab, when he realized that something was going to happen and hollered, "Look out," and that then there was a crash or something, although he does not remember hearing the crash, and that is all he remembers until he awakened in the hospital. On cross-examination he states that he saw the cab ahead and apparently at a stand-still; that it is his best judgment it was at a complete stand-still; that he never saw the other LaSalle cab which was parked on the east curb; that it may have been standing there but he did not see it; that had he been looking he could have seen the other cab; that when they passed the north side of 25th street the car ahead and their car were travelling at about the same speed, which might have been more than thirty miles an hour; that it was a closely built up business district they were passing through; that just before the accident plaintiff was talking to Chamberlain; that when they were probably thirty feet south of the place of the accident the car ahead turned in to the right towards the east; that just before it turned it had been travelling with its lefthand wheels about in the center of Michigan avenue; that the witness did not know whether the cab was at a standstill or in slow motion, the accident happened so quickly; he testified that nobody was lighting a cigarette in their car when the accident happened; that Baumgardner rode along at a normal

rate of speed; that his car was in good condition as far as he could observe; that he was going along very carefully; that plaintiff did not see the driver of the LaSalle cab at all; that he saw no signal from him and did not see the driver at all, but that he probably could have seen the driver of the cab if he had been looking for him.

Chamberlain testified that he saw the Hotel LaSalle cab about a block south of where the accident happened; that it was about thirty or thirty-five feet ahead and was going at the same speed as the Hudson and was a little bit "to our left;" that on crossing 25th street he did not see a Checker cab on the righthand side of the street; that after crossing 25th street he still saw the LaSalle cab about thirty feet ahead going at the same rate; that there was a car parked alongside of the cab in front of the Rue Motor Company's window on the east side of the street and the LaSalle cab pulled alongside of it and stopped when they ran into it; that there was about three or four feet distance between the car parked alongside of the curb and the cab which came to a stop; that as they approached the scene of the accident plaintiff yelled "Watch out;" they they were right on it when he yelled; that the witness does not know whether Baumgardner did anything with his car as they approached this standing cab; that he did not try to get the safety or emergency brake, nor did anybody else; that when the LaSalle cab that was ahead came to a stop it was right in front of him; that he could see the driver of the cab; that the driver gave no signal when he stopped the car; that he did not extend his arm out to the left away from the car; that he did not see any raised hand, and that he would have seen it had it been raised; that no signal or warning of any kind was given at any time when the car was slackening or stopping; that when the cab came to a stop it was right in the center of the street, right in the way of traffic; that other machines were coming south on Michigan avenue, all over the street, some close to the curb, some practically

in the center of the street; that the usual ordinary speed for motors traveling along Michigan avenue at that place and at that time is twenty-five miles an hour; that the LaSalle cab after the accident was knocked ahead about fifty or seventy-five feet; that when they hit the cab the windshield broke and the gasoline tank exploded and that the spray of the gasoline ignited plaintiff's hair and his hair was on fire; that when the cab came to a stop they were about ten feet directly behind it; that Baumgardner kept on going straight and hit it directly in the back, without turning to the right or left; that the cab had been going twenty-five miles an hour and it suddenly came to a stop and within a couple of feet; that it didn't go directly across their path because it was hardly in their path; that the west wheels of the cab had been in the center line of the street; that when the cab was about 125 feet south of the place of the accident it started to pull over towards the curb, thereby coming across their path; that the Hudson car was then about thirty or thirty-five feet south of the cab; that the cab was pulling over to the east side of the street gradually and the coupe kept along about thirty to thirty-five feet behind the cab; then when the cab got right alongside of the other cab that was parked at the curb, it stopped about three or four feet from it and the coupe went the remaining thirty or thirty-five feet into the rear of the cab when it was at a standstill. The witness further says that he didn't see the cab standing there until they were right onto it.

On cross-examination the witness stated that the LaSalle cab was not over 37 feet ahead when it started to suddenly stop; that starting from a point about ten feet north of the north side of 25th street, the cab started to move over and cut over to the east curb of Michigan avenue, and then, when it got alongside

of the other cab and was about three or four feet to the west of the standing cab, it suddenly came to a stop; that all he could remember is seeing the rear tire of the cab and then they hit it; that the reason he didn't see the cab until they were right on it was because he was not looking. He says: "I saw the cab start to turn over and then I lost track of it. The first thing I knew I saw the tire and we smashed into it. I saw the cab start to turn over towards the curb when it was ten feet north of 25th street, and then I lost track of it, and then I looked up and saw the rear tire and then we smashed into it."

Baumgardner testified that after leaving the homes of the women he sat in the driver's seat of the coupe a little in front of the back seat, which would accommodate two people; that Chamberlain was sitting next to him and a little in back of him, and Brown was sitting at the right of Chamberlain on the same seat; that there was no obstruction all the way across the car as far as seeing out of the front of the car was concerned; that it was perfectly clear and his lights were lit; that as they came along Michigan avenue north, they were going with the traffic and running about two cars width out from the east curb; that they followed several cars and the LaSalle cab in particular, which he first noticed a block and a half or two blocks south of the scene of the accident; that he drove up the street behind the cab all the way up to the point of the accident; that the LaSalle cab was running just to the right of the street; that his left front wheel was in line with the cab's right rear wheel; that they were traveling about the same rate of speed, the cab about thirty or thirty-five feet ahead of his car and both travelling at thirty miles an hour; that he could see ahead all the time and had no trouble with any cross traffic; that at 25th street the LaSalle cab was still the same distance ahead of him; that it pulled into the right ahead of him without any warning, and

of the street and was alone there on foot just in the nick of the evening and, it suddenly came to a stop; that all in could procedure in making the near line of its end and then they it; that the reason be that; and the end would they were which on it was because he was not looking. He began. It was the end start to turn over and then I lost sight of it. The first thing I knew I was the city and as morning just it. I was the not start to turn over inside the road then I was the feet north of this street, and then I lost track of it, and then I turned up and saw the road like and then it wouldn't turn it.'

Thoughtfully listening that after hearing the tale of the wound he was on the driver's back of the shape a little in front of the front seat, which would accommodate two people; this Wonderbirds was sitting next to him and a little in back of him, and Brown was sitting at the right of Wonderbirds on the front seat; this there was no distinction all the way making the car or its be seeing and of the front or the car was concerned; that it was perfectly clear and it. Little while it; then as they came along Tulliver appears north, they were going with the traffic and turning about the corner of the car from the east side; that they Tulliver covered here and the Tuesday but in addition, which he first noticed a Black car a Ford or the Plymo north of the corner of the accident; that he drove up the street behind the car all the way up to the point of the accident; that the driving car was running that in the right of the street; that the left front wheel was in line with the car's right wheel; that they were travelling about the same rate of speed, the car ahead of him or in front of him; that he could see about the car and the car was in motion when he hear; that he could see about the car and had no trouble with the engine; that at the time the Bluebird car was hit the car Tulliver drove had a flat tire; that it swerve into the right side of the street and the Bluebird car was hit the left side of the Tulliver car; and

he crashed into the rear of it; that the cab came to a sudden stop alongside of the other cab which was parked against the curb; that at the time he saw the cab cut across to the right it was the first break he had made from this north and south line that he had been maintaining as he drove up the street two blocks; that at that time the LaSalle cab started to turn to the right and that when he saw him do that he tried to stop; that he threw out his clutch and put on his brakes, which would take a second or more; that while doing it he crashed into the cab. He further says he does not remember whether the plaintiff yelled just before the accident or not; that if the LaSalle cab was not stopped at the time he struck it, it was practically stopped; that it had either stopped or was coming to a stop, it was slackening down speed. "The cab cut across our path and slackened speed." He says that if the driver of the LaSalle cab did hold out his hand he did not see it, and that the reason he testified as he did on the former trial was that he was then living with his wife but since that time had been divorced.

For the defendant, Peterson, driver of the damaged LaSalle cab, at the time of the trial not employed by defendant, testifies that he had been driving passengers around all night and was on his way back to the hotel, Madison and LaSalle streets; that when he reached 25th street he was going at the rate of twelve or fifteen miles an hour; that he noticed the LaSalle cab standing at the curb and that he held up his right hand when about fifteen or twenty feet north of 25th street; that at about the same place he began to slacken up, took his foot off the accelerator and left the clutch in, which reduced his speed to three or four miles an hour; that he then pulled alongside the other LaSalle cab at the curb and asked the driver what was the matter; that the driver, one Conway, told him to pull in on the

side; that the cab which he, Peterson, was then driving, was then struck from the rear and knocked forward, he says, as far as 150 feet. On cross-examination Peterson said he was traveling up Michigan avenue looking for a passenger and was going slower than the traffic; that at the time of the accident his cab was about six to ten inches from the one driven by Conway.

Conway testifies that as the LaSalle cabs had at that time no meters the driver kept books, and that he was then entering his trips on the trip sheets; that Peterson asked him what the trouble was and that he answered "Nothing;" then the crash came. He says that Peterson's car was in slow motion when it was hit; that it went about 50 to 75 feet after the impact and came to a stop to the right of the center of the east side of the street.

Ben Simon, a driver for the Checker Taxi Cab Company, testified that he saw the Peterson cab and followed it from 30th street all the way until it was hit; that he was about half a block behind it all the way; that there was nothing between him and this cab as he proceeded north; that he had no passenger and was looking for one; that Peterson's cab was going at about the same speed as he, Simon, was; that as he approached 25th street he continued at about the same speed; that he started to stop at the south side of 25th street and actually stopped at the north crosswalk of it; that he stopped because he heard the horn, and the coupe then passed him; that he saw the two LaSalle cabs in front of him; that the Peterson cab was about half a block away from him when he heard the horn behind him; that he saw the LaSalle cab which he had been following slow up "and the coupe passed me and ran into the rear end of the LaSalle cab. He said the coupe was going more than thirty miles an hour, but on cross-examination said that it might have been twenty-five or thirty-five miles; that he did not know whether the horn was from the coupe or not,

and that he did not know whether the LaSalle cab was moving or standing still by reason of the distance he was from it, and for that reason couldn't see whether the driver, Peterson, gave a signal, but he did not see any signal given.

The defendant Hotel LaSalle Company has strenuously argued from this conflict in the testimony that the verdict is manifestly against the weight of the evidence. The arguments presented are not without some force in view of the financial interest of the plaintiff, the admitted fact that two of the plaintiff's witnesses called to testify under oath upon previous occasions fabricated a story as to the manner in which the accident occurred; that an examination of the whole record indicates that the plaintiff and defendant Baumgardner evidently designed to conduct the trial in such a way as might be most beneficial to each of them, resulting in what appears to us a rather startling verdict from the jury, finding one defendant guilty and the other not. However, we do not deem it necessary to discuss the weight of the evidence or pass final opinion on it, and shall not do so in view of the fact that for other reasons a re-trial of the case is made necessary. There was some evidence before the jury tending to show that the driver of the Hudson coupe was intoxicated. He was found not guilty of that charge upon trial in the Municipal court, but it is not denied that evidence was fabricated for that occasion.

Upon cross-examination of one of the witnesses it developed that a police officer named McDermott had stated on a former trial that he had found a bottle of whiskey in Mr. Baumgardner's coupe immediately after the accident. McDermott was during a part of the last trial present in the courtroom but was not called as a witness.

In the course of his argument to the jury the attorney for the plaintiff said: "Yes, Mr. Reeve, why he didn't

call McDermott on the stand. He tells you McDermott came up here last Saturday and he was peeved, and that is the reason. Now I conceded, I must concede, that if a bottle of whiskey were to have been found in this car after this accident, mind you, that that probably would be the most clear evidence that one could make, if you could say that they have found a bottle of whiskey, that they had been drinking in that car. Why, I don't know how I could meet it. If that is a defense, and if they had a defense of that kind, do you mean to tell me that they would allow their star witness to get away from them? Not a bit of it; it isn't done. You know, we fellows that are trying these lawsuits and realize the benefit of such a bit of evidence, you know as well as I do that Mr. Reeve would never have allowed McDermott to get away. What I am getting at is this: that when this case was tried before it was McDermott that testified -- what occurred on that hearing you don't know. You don't know McDermott is the man who claimed he found the bottle; they didn't dare use him on the trial of this case. Why? Do you think it was fair to attempt to plant a bottle in this case, plant a bottle in this accident, after that was -- " Mr. Reeve: "I object to that statement your Honor, based on no evidence, and ask that this jury be instructed to disregard it." The Court: "If that is a reasonable inference to be drawn from the evidence --" Mr. Irwin: "It is the inference I get from the evidence, and you have to make your own inference."

The fact that McDermott had on the former trial testified to the finding of the bottle of whiskey was brought out upon the cross-examination of the witness Peterson by the attorney for the plaintiff. The defendant had a right either to call McDermott as a witness or to refuse to call him, and as we view it counsel had no right to argue from the fact he was not called that

an attempt had been made by the defendant to "plant a bottle in this case." The jury could not have misunderstood the meaning of this remark. It plainly meant that the defendant was guilty of framing a defense and trying to deceive and mislead the jury. The remarks of counsel should have been stricken out. On the contrary the record shows that the court made a remark which must have been construed by the jury as indicating that the court thought the argument justifiable. In a case so close upon the facts we cannot but regard this as reversible error. It is unnecessary to cite the cases in which judgments have been reversed for less serious error. See the recent case of Mattice v. Flowers, 312 Ill., 301.

Complaint is also made of instructions given to the jury. At the request of the co-defendant the court told the jury:

> "The court instructs you that the law does not definitely limit the precise rate of speed in miles per hour above which an automobile must not be run under given circumstances, and the court does not intend, by anything said in these instructions, to tell the jury, as a matter of law, that any particular speed of an automobile in miles per hour, at any particular time and place, under given circumstances, is a violation of the statute of the state of Illinois."

Section 22 of chapter 95A, Cahill's Illinois Revised Statutes of 1923, being the Motor Vehicle Law, provides in substance that if the rate of speed of any motor vehicle operated upon any public highway in this state where the same passes through the closely built up business portions of any city, town or village exceeds ten miles an hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the way so as to endanger the life of a person or injure property. The evidence in this case is undisputed that Michigan avenue at and near to the place where this accident occurred is a closely built up business district. In

Harrison v. Flowers, 308 Ill. 194, the Supreme Court said:

> "The only limitation fixed by the statute is that no person shall drive a motor vehicle upon any public highway in this state at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. What speed is improper and dangerous is left to the courts to determine from the evidence in each particular case. The section establishes a rule of law, which declares that certain rates of speed in certain localities shall be prima facie unreasonable and dangerous. There is no intimation that such rates of speed shall be conclusive proof of negligence. Prima facie means first view, - that is, as it first appears. A prima facie case is one which is apparently established by evidence adduced by the plaintiff in support of his case up to the time such evidence stands unexplained and uncontradicted. The words 'prima facie' when used to describe evidence ex vi termini imply that such evidence may be rebutted by competent testimony."

To the same effect is Johnson v. Vandermast, 308 Ill., 161.

The Hotel LaSalle contends that in the light of these decisions and the plain words of the statute the instruction was grossly misleading, and we think this contention is not without merit. The uncontradicted evidence tended to show that the rate of speed at which the Hudson coupe moved was prima facie a violation of the statute. True, that prima facie showing might be overcome by other evidence, and it was for the jury to say upon the whole evidence whether this prima facie showing had been in fact overcome; but, in considering that question, the jury should have been instructed to give due weight to the law as declared in the statute. This instruction as given practically directed the jury, we think, to disregard the statute or at least it might have been so understood.

For the errors indicated the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., concurs.
Johnston, J., dissents.

4092

106 - 29194

SAM SALK,
Appellee,

vs.

NATIONAL CASUALTY COMPANY,
a corporation,
Appellant.

235 I.A. 616

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for $100 entered in favor of the plaintiff upon the finding of the court.

The action was based on an accident and health insurance policy which provided as follows: "Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In event of accidental death immediate notice thereof must be given to the Company." The plaintiff claimed under this policy and sued on account of injuries alleged to have been sustained by him on the 15th day of September, 1921, at seven o'clock A. M. The notice was in writing and dated at Chicago, Illinois, November 22, 1921. The statement of the plaintiff shows that the doctor was called upon the date upon which defendant received his injury, and the statement of the doctor who attended corroborates the statement of the plaintiff.

The plaintiff has not appeared in this court to support the judgment rendered in his favor, and the statute seems to provide that a policy of this sort may contain a requirement of this kind with reference to notice of an

injury received. (See Smith's Illinois Revised Statutes, 1933, paragraph 364 on page 1202.)

The evidence tends to show that the plaintiff was under the constant care of his physician from the time that he received the injury up to the time of sending the notice, and we do not find any evidence tending to show that notice was waived by the defendant.

It follows that the judgment must be reversed.

REVERSED.

McCurely, P. J., and Johnston, J., concurs.

138 - 29227

408a

235 I.A. 616

DENNIS J. MGAN,
Appellant,

vs.

MARSH VALVE CO. et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below appeals from a judgment for one cent damages and costs entered upon the verdict of a jury in an action of debt upon a replevin bond for $3,500.

The bond sued on was given in the beginning of an action of replevin in which Marsh Valve Co. was plaintiff and John M. Murphy and George A. Bottum were defendants. By virtue of the writ the goods were taken out of Murphy's possession and delivered to the plaintiff. However, on the trial the Marshal Valve Co. was non-suited, and now when sued upon the bond (by virtue of the provisions of the statute) pleads title in the goods as a defense except as to nominal damages.

The amended affidavit of merits filed by leave of court after the verdict of the jury had been returned alleges a good defense to the suit upon the merits to the whole of plaintiff's demand, except one cent, and this defense is stated to be that on February 21, 1922, when the replevin suit was called in the Municipal court of Chicago the Marsh Valve Co. moved the court that the suit be non-suited and it was so ordered, and that no trial was had upon the merits of the cause; further, that Bottum, one of the defendants in the replevin suit, falsely and fraudulently represented (at the time of the purchase and sale of the goods replevied) the amount of property owned by him in a false and fraudulent statement which he submitted to the Marsh Valve Co., and by

these representations obtained the goods upon credit without intending to pay therefor; that Murphy was a party to these false and fraudulent representations and a co-conspirator with Bottum, who was not an innocent purchaser of the goods for value; and that the Marsh Valve Co. rescinded any supposed sale of the goods replevied; that at the time the goods were replevied the same were the property of the Marsh Valve Co.

The plaintiff in his brief submits fifteen points for our consideration, most of which are based on supposed insufficiency of the evidence. He insists that an instruction to return a verdict for the plaintiff should have been given, argues that Murphy stands in the position of a purchaser for value and in good faith and without notice, and that as such he acquired a valid title to the goods in question, irrespective of the title of his vendor, etc.

These points, elaborately presented with a wealth of authority, this court is precluded from considering because of the condition of the record. The jury, it appears, was asked to make a special finding as to whether "at and before the service of the writ of replevin was J. E. Murphy in actual possession of the valves in controversy in this case, under a <u>bona fide</u> purchase for value from some person other than the Marsh Valve Co." The jury answered "No," and the record fails to disclose that, upon the motion for a new trial plaintiff made any motion to amend or set aside this special finding. It is well settled that in the absence of such a motion the plaintiff is conclusively bound by the special finding of fact. Of the numerous cases to this point which might be cited, two will suffice - <u>Voight</u> v. <u>Anglo-American Provision Co.</u>, 202 Ill. 463, and <u>Brimie</u> v. <u>Belden Mfg. Co.</u>, 287 Ill., 11.

The plaintiff further contends that the affidavit of

defense and the pleas of the defendant were insufficient. However, the plaintiff did not either demur or move to strike, but on the contrary joined issue. After verdict and before judgment amended pleadings were filed by leave of court which, by virtue of the provisions of the statute, it was in the discretion of the court to give. (See Smith-Hurd's Revised Statutes, chapter 7, section 1, and Smith-Hurd's Revised Statutes, chapter 110, section 39.) Whatever the merits of these questions might have been if otherwise raised, we think there was no defect in the pleadings which the verdict did not cure. Many cases might be cited to this point, but the law is elementary.

The next contention of the plaintiff is that where it appears that a replevin suit has been non-suited and in an action on the replevin bond the defendant pleads and proves title to the property in him, the plaintiff is nevertheless entitled to his damages, which consist not only of nominal damages and costs but a reasonable attorney's fee for defending the replevin suit. In support of this contention the plaintiff relies on the case of Gilbert v. Sprague, 196 Ill., 453. There is language in that case that would seem to sustain the contention of plaintiff as a matter of first impression, but a closer consideration shows that the point was not discussed upon principle and that the cases cited in support of the conclusion of the court are Appellate court cases which an examination indicates do not bear out that construction. There is, of course, no question that where in the original replevin suit the issue has been tried upon the merits, the defendant is then entitled to damages on his bond which will include attorney's fees incurred in the prosecution of the suit. Pace v. Neal, 92 Ill. App. 416. But section 26 of the act revising the law in relation to replevin (Smith-Hurd's Illinois Rev. Stat. chap. 119) specifically provides:

defense and the minor or the defendants were involuntary. However, the plaintiff did not waive errors or move to strike, but on the contrary [illegible] after verdict and motion for new trial [illegible] were filed by leave of court which, by virtue of the provisions of the statute, it was in the discretion of the court to grant. (See Ill.-Mich. Service Corporation, supra, 7, section 1; and Dotson v. Dotson Estimons, supra 115, note 20.) Moreover the merits of these questions might have been if otherwise raised, as which there was no issue in the pleadings which the evidence did not cure. Our cases might be cited to this point, but the law is elementary.

The mere assertion of the plaintiff in her brief that a trailer coil has been non-metal and is an [illegible] on the roadway bend the defendant planes and prove this to the property in fact, the plaintiff is nevertheless entitled to the Court, which decided that only of [illegible] Insurance and [illegible] that a reasonable minority's for (v) determine the [illegible] [illegible] be answer of this contention the plaintiff within on the [illegible] Gilbert v. Bergman, 304 Ill., 414. There is language in that case that would seem to sustain the assignment of plaintiff as a matter of first impression, but a closer consideration shows that the point was not discussed upon principle and that the cases cited in support of the conclusion of the court are inapplicable. Many cases which on superficial inspection do not bear on that contention. There is, of course, no question that there is the additional minority that the State has taken hold upon the [illegible], the [illegible] is [illegible] [illegible] on the [illegible] will [illegible] [illegible] [illegible] however in the prosecution of our [illegible]. Dunn v. Dunn, 92 Ill. App. 626. The position of the [illegible] [illegible] the law in [illegible] [illegible] Insurance, Ill. App. [illegible] [illegible] [illegible]

"When the merits of the case have not been determined in the trial of the action in which the bond was given, the defendant in the action upon the replevin bond may plead that fact and his title to the property in dispute in said action of replevin."

In the case which is now before us the original suit was not tried upon the merits, and suit being brought upon the bond, the defendant availed itself of this provision of the statute and set up not only title to the property replevied, but the right of possession at the time the suit was brought. Nominally there is, of course, a breach of the bond, because the plaintiff in the replevin suit (the defendant in this suit) failed to prosecute with effect. But why, in view of the special finding of the jury, should the defendant be obligated to pay solicitor's fees incurred by defendants Bottum and Murphy in an attempt to hold goods which they obtained from defendant by fraudulent means? The proposition shocks the sense of natural justice.

The precise question seems to have been passed on by the Appellate Court of this district in Lyon & Healy v. Fenne, 86 Ill. App. 251, where the court said:

"But, however that may be, in no event was appellee entitled to more than nominal damages, which would carry a judgment for costs. Where the plaintiff in replevin dismisses his suit or suffers a nonsuit without a trial on the merits, he may show, in an action on the bond, in mitigation of damages, that the property involved was in fact his property, and upon such showing being made there can be recovered only nominal damages. Chinn v. McCoy, 19 Ill., 604; Ranchetti v. Gardner, 138 Ill. 577; O'Donnell v. Colby, 153 Ill. 324-9; Schweer v. Schwabacher, 17 Ill. App. 78; Weber v. Mackey, 81 id. 369-75; Hertz v. Kaufman, 46 id. 591."

We therefore conclude that this contention cannot be sustained.

It is also argued in behalf of the plaintiff that the court erred in denying plaintiff's request for an instruction to find the issues in his favor. We think that upon the uncontradicted evidence showing the original suit was not prosecuted with

effect, plaintiff was entitled to such an instruction, but the jury found in plaintiff's favor; he has therefore not been injured in that respect.

It is also argued that the court erred in refusing to give some instructions requested by plaintiff, in giving with modifications certain others, and also in giving instructions requested by the defendant. We think the jury was fairly instructed upon the law applicable, and in view of the special finding of the jury and the condition of the record as heretofore referred to under the evidence, no other general verdict than the one returned could have been permitted to stand. It follows that whatever criticism may justly be made, as to the instructions, the error, if such it was, is not reversible.

The judgment of the trial court will therefore be affirmed.

AFFIRMED.

McSurely, P.J., and Johnston, J., concur.

168 - 29257

408a

235 I.A. 617

TOM ANAGNOSTOU,
Appellee,

vs.

GUST KARIDES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff brought suit in forcible detainer to recover possession of certain premises in the city of Chicago, described as "Front store, ground floor, known as No. 722-24 Blue Island Av." The cause was tried by the court and a jury and the court at the conclusion of all the evidence directed the jury to return a verdict for the plaintiff, which the jury did and judgment was entered upon the verdict.

It is first urged that the court erred in instructing the jury to return a verdict for plaintiff and the cases of Bechtel v. Marshall, 283 Ill., 486, O'Leary v. Chicago City Ry. Co., 235 Ill., 187, Bailey v. Robinson, 233 Ill., 614, are cited to the well established point that where there is any evidence from which a jury can reasonably find for a defendant upon the issues, it is error for the court to weigh the evidence and instruct for the plaintiff.

The uncontradicted evidence tended to show that defendant is the owner of the entire premises, of which those sued for are a part, and that on September 21, 1921, he by a written lease under seal demised "The store in the first floor and except the rear of said premises where is now a 'partition' in the said store," to plaintiff for a term beginning October 1, 1921, and ending April 30, 1925, to be occupied for a manufactory and wholesale and retail of soft drinks.

Plaintiff had been engaged in this business and at this place for several years prior thereto, and during two years of that time had occupied the back store of these premises. He entered into possession under the lease, paid his rent and was conducting his business there.

In June or July, 1923, repairs on the front store became necessary and the plaintiff, with the consent of the defendant, moved into the back store, while defendant assumed the work of causing the repairs to be made. Plaintiff at about this time asked the Edison company to send some one to remove his apparatus to the rear store while the repairs were being made. There was a conversation between defendant and plaintiff prior to the removal of defendant's business to the back store, which was about June 23, 1923. The defendant testified: "I opened up the big doors to put the machinery in. Then I put the big machine in the store. The three partners said to me, 'Mr. Karides, we want to rent the rear for less rent, for $50 a month. You open up the big doors and fix the store.' I did open up the big doors and fix the store, for them to put their machine inside. This was in the month of August."

The plaintiff had been paying under the terms of his written lease $65 a month, but in August, after moving, he paid only $50 and on the first of October sent to the defendant a cashier's check for $40 in payment of the September rent. This check was accompanied by a letter as follows:

> "Dear Sir: About the 5th day of September, 1923, you refused to accept the forty ($40.00) dollars that I offered you as the rent for the temporary quarters that I moved to while you were repairing the store 722-24 Blue Island Avenue, this store leased by me from you, said lease expiring April 30th, 1925. I herewith enclose a cashier's check for forty ($40.00) dollars, again in payment of the rent for the temporary quarters, as aforesaid. For the last twenty (20) days I have demanded the keys to the store leased by me from you and you have promised each day to give them to me. Unless I receive these keys immediately upon the receipt of this letter I will take my lawyer's advice and sue for possession of the premises [illegible] possession of said store

from me. Very truly yours."

When plaintiff moved to the rear store he gave the defendant the key thereto, which the evidence shows he retained at the time of the trial, but he testified that plaintiff had never asked him for it. It may be that he never asked for it in an oral conversation, but this letter conclusively shows that a demand was made, not for a key but for the keys of the store, at this time.

The evidence further shows that on September 24, 1923, which, it will be noticed, was prior to the date of this letter, the defendant brought suit in the Municipal court against plaintiff in an action of forcible detainer and for the very premises described in the lease. He included in his suit a claim for rent for these same premises in the sum of $65 and for the month of September, 1923. Attached to the statement of claim is the affidavit of defendant, subscribed and sworn to on September 24, 1923, in which he states that he has knowledge of the facts and that there is due to him as plaintiff there from the plaintiff in this suit, after allowing all just credits, deductions and set-offs, the sum of $65.

The attorney for the defendant repeatedly stated to the trial court that his defense was that plaintiff had abandoned the premises. Shifting his grounds somewhat in this court, he prosecutes his appeal upon the theory that the evidence submitted is sufficient to raise a question for the jury as to whether a verbal agreement had been made between the parties to terminate the written lease, the same being accompanied by a surrender of the possession of the premises to the landlord, who accepted the same, pursuant to an agreement between the parties.

That oral evidence may be received in order to show such a surrender and acceptance is held in a number of cases which defendant cites, - Alschuler v. Schiff, 164 Ill., 398; Dills v. Stubis, 81 Ill., 202; Thompson v. Western Casket Co., 219 Ill. App.

from me. Very truly yours."

When plaintiff moved to the rear where he just ate dinner in his theory, while the officers were by twelve at the side of the road, but he testified that plaintiff had never asked him for it. It may be that he never asked for it in an oral conversation, but this letter conclusively shows that a demand was made, not for a day but for the days of the alone, as this claim.

The evidence further shows that on September 20, 1888, which, it will be noticed, was prior to the date of this letter, the defendant brought suit in the Municipal court against plaintiff in an action of invoice indicator and for the very grievance described in the issue. He instituted in his suit a claim for rent for three more premises in the sum of 35$ and for the month of September, 1888. Attached to the statement of claim is the affidavit of defendant, subscribed and sworn to on September 21, 1888, in which he states that he has knowledge of the claim and that there is due to him as plaintiff there from the sum of $ [illegible] in this suit, after allowing all just credits, deductions and set-offs, the sum of $20.

The attorney for the defendant repeatedly stated to the trial court that his defense was full plaintiff had discharged the premises. Dividing the grounds assumed in this court, he presents the novel case the theory that the landlord reduced is sufficient to make a question for the jury as to whether a verbal agreement had been made between the parties to terminate the written lease, the case being accompanied by a surrender of the premises to the landlord, who accepted the same, pursuant to an alleged parol agreement.

That such evidence may be received in order to show such a surrender and acceptance is well established in cases which determine other, - Kingsbury v. Donnell, 100 Ill., 603; Ellis v. Stoyle, 81 Ill., 269; Jungers v. Jungers Sewer Pipe Co., 104 Ill., 328.

184, and McCormick v. Brennan, 224 Ill. App., 261. There is no question about the law as it is stated in these cases, but defendant has not pointed out and, we think, will not find in the record any words from which the oral agreement may be inferred, nor is there any conduct of the parties which appears in the record which would call for the application of the principle of estoppel.

We have already recited in this opinion the evidence of the defendant as to what was said at the oral conversation which preceded the moving of plaintiff's business into the back store.

It must be conceded that the written lease cast upon the defendant the burden of establishing the surrender, but there is not a syllable of testimony from which a jury could reasonably find that there was a cancellation of the lease with a surrender of the premises. It follows that the defense claimed was not established by the evidence.

The defendant next urges that the instruction was improper because, as defendant says, there was no proof that the defendant was in possession of the premises. The undisputed evidence shows that he held the key to the premises, and the undisputed evidence also shows that he made repairs upon the premises which could not have been made had he not been given possession for that purpose. There is no evidence in the record tending to show that he ever gave up the possession after getting it, and we think the facts and circumstances in evidence were prima facie sufficient.

The defendant also contends that the instruction was erroneous because there was no demand for possession prior to the bringing of the suit. The defendant denied plaintiff's testimony to the effect that he, plaintiff, had asked defendant for the key, but he did not deny the demand made upon him in the written letter for the possession of the premises, and since the proceeding was evidently brought under clause 2 of section 2 of chapter 57 of the

164, and Lockwood v. Jackson, 164 Ill. App., 382. There is no question that the law as it is stated in these cases, has not actually been not relinquished and, we think, will not find in the record any words from which the court surrounded may be inferred, nor is there any conduct of the judicial which appears in the record which would lay the qualification of the principle of estoppel.

We have already recited in this opinion the evidence of the defendant as to what was said at the legal conversation which preceded the serial of plaintiff's replevin bill, the-bank plaintiff.

It must be remembered that the written loans sent upon the instructions the burden of establishing the contrary, but there is not a quantity of testimony from which a jury might reasonably find that there was a conversation of the kind with a witness of the previous. It follows that the defense claimed has not sufficiently by the evidence.

The defendant put upon that the instructions was improper because, in defendant's, there was no proof that the defendant was in possession of the property. The testimonial evidence plaintiff to hold the key to the premises, and the undisputed evidence also shows that he was keeping upon his premises which could not have been made but it not been given possession for that purpose. There is no evidence in the record tending to show that he ever gave up his possession after getting it, and we take the facts and circumstances in evidence into account with them.

The defendant also contends that the instruction was erroneous because there was no demand for possession prior to the bringing of the suit. The defendant needed possibility testimony on the effect that by stipulation, but made defendant for the very, but he did not deny the amount made upon him in the certain letter for the possession of the premises, and since the proceeding was evidently brought under clause 4 of section 2 of chapter 87 of the

Illinois Revised Statutes, we think this demand was sufficient.

It is also urged in behalf of defendant that the court erred in its rulings in admitting and excluding evidence. The questions to which objections were sustained were certainly objectionable in form, and it is evident that whether the answers had been either one way or the other, the merits of the case would not have been affected.

The evidence establishing a prima facie case in favor of the plaintiff, and there being no evidence from which a jury could reasonably find in favor of the defendant, the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

190 - 29279

HARRY SCHALLMAN,
Appellant,

vs.

DR. H. D. REYNOLDS,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

235 I.A. 617

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff below from an order entered vacating a judgment by default theretofore entered upon the verdict of a jury. The default was entered for failure of the defendant to file a plea at the November term of the Superior court, 1923. At the same term the defendant made a motion to vacate the order of default and judgment which was continued to the December term, and during that term the motion was granted. Thereafter the defendant filed his plea, and the record indicates that the cause is still pending in the Superior court.

The order of which plaintiff complains is not an appealable one. The precise question has been decided in the case of Ravenson & Sons v. Adelson et al., general number 23767, opinion filed in this court March 10, 1924. It is unnecessary to repeat what was there stated.

This court is without jurisdiction to entertain this appeal, which should not have been granted and which will be dismissed.

APPEAL DISMISSED.

McSurely, P. J., and Johnston, J., concur.

215 - 29304

4/0/30

235 I.A. 617

ESTATE OF OTTO SCHWARZ, deceased, Appellee, vs. IN RE CLAIM OF LOUIS SCHWARZ, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant filed a claim in the Probate Court of Cook County against the estate of his deceased brother, Otto Schwarz, and an order was entered in that court allowing the claim in the sum of $700. Upon appeal to the Circuit Court of Cook County, the cause was tried de novo and submitted to a jury which brought in a verdict for the estate. Motions for a new trial and in arrest of judgment were overruled and judgment entered upon the verdict. The precise nature of the claim filed in the Probate Court does not appear from the abstract but from the evidence it appears that the father of these brothers owned a farm in Morton Grove, where he died in the year 1904, and that the deceased, after caring for the farm for some time in behalf of his mother, in about the year 1907, started to farm the land for himself. The testimony for the claimant further tends to show that from the year 1907 up to the year 1913 the deceased borrowed divers sums of money from the claimant, and that at a meeting held at their mother's house on the day before Thanksgiving in 1914, they settled their accounts at which time it was agreed that deceased was indebted to the claimant in the sum of $720 which he then promised to pay. It is undisputed that the deceased died on December 1, 1918.

There was also evidence tending to show that, in the spring of 1915, deceased delivered to the claimant five bags of

seed potatoes and that "he said to put that on his account, did not mention what account, take it off his bill." "Louis asked Otto how much that was. Otto said a dollar a sack and take them off my bill."

Ella Glass, a sister of the claimant; Elsie Herter, his niece; Peter F. Schwarz, a brother of Louis and Otto; Fredericka Schwarz, their mother; and Fred M. Krueger, a farmer, who, at the times in question, lived at Norton Grove; testified to facts tending to show the existence of the indebtedness, while Charles Buenyan, the father of Mrs. Otto Schwarz, Ella Frank, a sister of Mrs. Otto Schwarz, Minnie Merloff, a sister of Mrs. Otto Schwarz, all testified to facts tending to show that the alleged claim was not a valid one. Indeed, the law suit seemed to resolve itself into a contest between the deceased husband's relatives on the one side and the relatives of the wife of the deceased on the other.

The claimant contends that the verdict of the jury was manifestly against the weight of the evidence, but as the case will probably be submitted to another jury for reasons which we are about to state, it will be unnecessary to consider that point.

The claimant contends that certain instructions given by the court were erroneous. The principal defense relied on was that of the Statute of Limitations, and at the request of the estate, the court told the jury with reference to the alleged incident of crediting certain seed potatoes as a payment on the account, that the burden of proof rested upon the claimant to prove by a preponderance of the evidence that the seed potatoes were furnished the claimant within five years prior to December 1, 1918, and also that the deceased furnished the seed potatoes upon the identical account filed in the Probate Court, with the

intention thereby of recognizing the entire account, and that, unless the claimant had made such proof by a preponderance of the evidence, the jury should find for the estate.

In another instruction, the court told the jury that, in cases like the one on trial, unless the suit was commenced within five years after the cause of action accrued, the Statute of Limitations was a complete bar, and that, if the jury found that the suit was not commenced within five years after the debt sued for became due, the Statute was a complete bar and the jury should find for the defendant unless the jury further believe from the evidence that the defendant had made a new promise to pay the debt within five years prior to December 1, 1918.

It is argued by the claimant that this last instruction was erroneous in that it directed a verdict, and therefore should have contained every element necessary to defeat a recovery by the claimant; that claimant's case was predicated not alone upon distinct promises to pay the debt but also upon a payment made on the account within five years which last element the instruction ignores. We are inclined to think this criticism is justifiable and that the court erred in this instruction in directing a verdict while ignoring the theory of payment on the account, which there was evidence tending to prove.

We are also of the opinion that the court erred in directing the jury with reference to this payment on account that it must be made to appear that the deceased furnished the seed potatoes "upon the identical account filed in the Probate Court." That that account was does not appear. The claim filed in the Probate Court was not offered in evidence and was therefore not before the jury. To instruct the jury, therefore, that claimant must show that the potatoes were furnished upon the identical account filed, and with the intention of recognizing the entire account, required the jury to do an impossible thing. In the

Probate Court a claim is whatever the proof may show it to be. Pleadings are not required. Rothschild v. Lessell, 103 Ill. App. 283, on which the estate relies is easily distinguishable.

For these errors in instructing the jury, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

251 - 29340

4004a

MARTHA E. BERGREN,
Appellant,

vs.

PETER BALDACCINI,
Appellee.

235 I.A. 617

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The arguments of counsel disclose in this case (what the abstract fails to show) that the proceeding in the trial court was in the nature of a suit for the forcible detainer of certain premises. The trial was by the court without a jury. There was a finding for the defendant, upon which judgment was entered.

The appellee has made a motion in this court to dismiss the appeal, apparently upon the ground that this court is without jurisdiction, citing in support of the motion the case of Wentworth v. Sankstone, No. 27852, (not yet reported) decided by another division of this court. The decision cited has no application to the facts which appear in this record. That proceeding was by writ of error; this is an appeal. The motion to dismiss will be denied.

Neither of the parties to this record has seen fit to furnish a complete abstract, as required by rule 18 of this court. Much important evidence is not abstracted at all.

It appears, however, that the plaintiff, Martha E. Bergren, is the widow of one Andrew Bergren, deceased, who died in July, 1913, and who left a last will and testament, which has been probated in the Probate court of Cook County. It further appears that plaintiff is the owner of the property in controversy and that the defendant is in possession of it, obtaining such possession as a tenant of Andrew Bergren, then owner, through a lease which was not,

however, offered in evidence. It appears that the plaintiff can neither read nor write; that her daughter, Anna Bergren, is the executrix of the will of Andrew Bergren; and that, up to a month or so prior to the hearing, she, the daughter, had been taking care of the estate.

It further appears from the evidence that one McGinness, a son-in-law, served some sort of a paper or notice on the defendant, giving it to him in person; that it was served about 5:30 in the evening, upon what day does not appear, nor are the contents of the notice disclosed.

It further appears that the defendant never paid any money to the plaintiff personally, but paid rent to one of the daughters. The plaintiff apparently concedes that the notice served upon defendant was insufficient (if any notice was required) since her brief is directed to the point that, as the relation of landlord and tenant did not exist, and that as defendant did not enter into possession under the plaintiff or by her consent, he was therefore a trespasser, and that no notice or demand for possession was required or necessary. In support of this contention Merrell v. Bigelund, 81 Ill., 457, Schoonmaker v. Doolittle, 118 Ill., 605, Shepardson v. McDole, 49 Ill. App. 550, and other cases are cited. Even a casual reading of these cases discloses that the rules there laid down are not applicable to the facts appearing here.

The uncontradicted evidence of the plaintiff tended to show that he entered into possession of the premises under a lease from Andrew Bergren in his lifetime. The relation of landlord and tenant therefore did exist. Defendant was not a trespasser. He did not claim to hold adversely to plaintiff, who was in privity with Andrew Bergren. Demand and notice were therefore necessary as provided by the statute.

The judgment is affirmed. AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

62 - 29148

235 I.A. 617

MIKE WALENTI,
Complainant and Plaintiff in Error,

vs.

JOHN KROLIK et al.,
Defendants.

ALBERT J. TURNELL,
Defendant in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

ADDITIONAL OPINION ON PETITION FOR REHEARING.

Counsel for defendant in error urges in a petition for a rehearing that our above conclusion and order are contrary to the decision of the Supreme Court in Ruprecht v. Muhlke, Exr., 225 Ill. 188.

It appears from the opinion of the Supreme Court in that case that, on April 23, 1903, Catherine Bredow was the owner of certain premises in Chicago, subject to four trust deeds, securing an aggregate indebtedness of $14,000, and running to one Galt as trustee, also subject to a trust deed running to one Tripp as trustee and securing an indebtedness to one Philip Henrici of $6,000, and also subject to a mortgage for $4,000 owned by Caroline Ruprecht, the plaintiff in error, all of which were liens on the premises in the order named; that Ruprecht filed a bill in the Superior Court of Cook County to foreclose her mortgage, and Galt filed a bill in the same court to foreclose the trust deeds running to him, and the two actions were consolidated; that after a hearing before a master he reported the amounts due upon the Galt trust deeds, the Tripp trust deed and the Ruprecht mortgage, and on October 21, 1903, a decree of foreclosure was entered; that on the master's sale Galt bid the amount of his trust deeds, interest and costs, and the premises were struck off and sold to him, and the master's report of sale was

approved; that on November 24, 1903, on Henrici's petition the court appointed a receiver, over Ruprecht's objection, to take charge of the property during the redemption period and to collect the rents; that Ruprecht, "who had been let into the possession of the premises," surrendered possession to the receiver; that upon her interlocutory appeal the order appointing the receiver was reversed (Ruprecht v. Henrici, 113 Ill. App. 398) upon the ground that Henrici's pleadings did not entitle him to such affirmative relief; that at the time of said reversal the receiver had a net balance in his hands, less proper disbursements, of $948.37, collected from rents; that Henrici thereafter filed a cross-bill in the superior court, praying for a receiver and asking that the rents from the premises be applied to the payment of his indebtedness secured by the Tripp trust deed, and the court again appointed the same person as receiver; that upon Ruprecht's second interlocutory appeal this action was affirmed (Ruprecht v. Henrici, 116 Ill. App. 583); that said receiver, being again placed in possession, charged himself with said balance in his hands of $948.37, and thereafter collected further rents and on April 18, 1905, had in his hands, after making proper disbursements, the sum of $3352.04; that on May 22, 1905, Ruprecht filed a petition asking that the receiver be required to pay over to her all moneys collected by him in rents during both receiverships, but the court denied the petition, allowed the receiver as his compensation $433.66, and directed him to turn over to Henrici, to apply on the indebtedness secured by the Tripp trust deed, the balance in his hands, which, after deducting his compensation and expenses, amounted to $2918.38; that on Ruprecht's appeal to this appellate court these actions of the superior court were affirmed (Ruprecht v. Henrici, 127 Ill. App. 350); that while the cause was pending here Henrici died and his executor, Joseph H. Muhlke, was sub-

stituted in his stead; that upon review, on Ruprecht's writ of error, the decree of the superior court and the judgment of this appellate court were reversed by the Supreme Court and the cause was remanded with directions to the superior court to enter a decree directing the receiver to pay over to Ruprecht said sum of $948.37 (that being the net balance in his hands arising from rents collected during his first receivership), but that he pay the amount received by him during his second receivership, less his compensation and disbursements during that period, to Henrici's said executor. In the opinion of the Supreme Court it is said (p. 193, italics ours):

> "It appears that at the time Clettenberg was appointed receiver on the petition of Philip Henrici, on November 24, 1903, plaintiff in error (Ruprecht) was lawfully in possession of said premises, which entitled her to the rents and profits arising therefrom during the period of redemption, against Catherine Bredow or anyone claiming through or under her * * . The receiver, under an order of court, obtained the possession of the premises from the plaintiff in error, and upon his appointment being set aside and vacated we see no reason why the possession of the premises should not have been restored to the plaintiff in error, and the rents, issues and profits arising from the premises collected by the receiver, less the receiver's legitimate expenses during the period intervening between his appointment and the annulment thereof, turned over by the receiver to the plaintiff in error. Had the possession of said premises not been taken from the plaintiff in error by the receiver under the order of the court she would have received said rents, issues and profits, and, as it subsequently appeared the receiver was improperly appointed and he was removed, we do not think the defendant in error (Henrici's executor) can avail himself of such appointment to deprive plaintiff in error of the use of said premises during the time said receiver was improperly in the possession of said premises, but think that the receiver during that period must be held to have retained the possession of said premises for the use and benefit of the plaintiff in error."

The facts in the Ruprecht case are different from those in the present case, and we do not think that the decision in the Ruprecht case should be controlling here. Some time prior to the first appointment of the receiver in the Ruprecht case, Caroline Ruprecht "had been let into the possession of the premises," and was "lawfully in possession of said premises" when she surrendered

allowed in his stead; that upon review, on plaintiff's writ of error, the decree of the superior court and the judgment of the appellate court were reversed by the Supreme Court and the cause was remanded with directions to the superior court to enter a decree directing the receiver to pay over to defendant the full sum of $540.00 (that being the net balance in his hands arising from rents collected during his first receivership), but that he pay the amount received by him during his second receivership, less his compensation and disbursements during that period, to plaintiff's said successor. In the opinion of the Supreme Court it is said (p. 493, italics ours):

> "It appears that at the time the receiver was appointed pursuant to the petition of Hamilton, on November 21, 1923, plaintiff in error (appellant) was entitled to possession of said premises, which entitled him to the rents and profits arising therefrom during the period of redemption, against defendant in error Hamilton, grantee of the mortgagee. * * * The receiver, under an order of court, took the possession of the premises from the plaintiff in error, and upon his appointment being set aside and vacated we are of opinion that the possession of the premises should have been restored to the plaintiff in error, and the rents, issues and profits arising from the premises collected by the receiver, less the receiver's legitimate expenses during the period intervening between his appointment and the appellate court's decree, should be paid over by the receiver to the plaintiff in error. Had the possession of said premises not been taken from the plaintiff in error by the receiver under the order of the court he would have collected said rents, issues and profits, and, as it subsequently appeared the receiver was improperly appointed and he was removed, we do not think the defendant in error Hamilton's successor can avail himself of such appointment to deprive plaintiff in error of the use of said premises during the time said receiver was *in possession* of such premises, but think that the receiver during that period must be held to have retained the possession of said premises for the use and benefit of the plaintiff in error."

The facts in the Hamilton case are different from those in the present case, and we do not think that the decision in the Hamilton case should be controlling here. Upon the order in the first appointment of the receiver in the Hamilton case, [illegible] recited "that said [illegible] the possession of the premises," and was "[illegible] in possession of said premises" when the [illegible]

them to the receiver, who had been placed in possession "improperly." In the present case Terwell is a claimant under Wind, having purchased from him the equity of redemption about January 22, 1922, (more than two years after Lubis had been appointed receiver, and several months after the foreclosure decree had been entered). On February 17, 1923, he filed his petition asking that the appointment of Lubis as receiver (made January 6, 1921) be vacated and that Lubis account to him for all moneys collected as rents. The present record further discloses that at the time of Lubis' appointment, immediately following the filing of complainant's bill to foreclose, tenants of Wind were in possession of the premises; that the premises were insufficient security for complainant's mortgage indebtedness; that Wind had refused to make necessary repairs and had permitted waste to be committed; that by the terms of complainant's trust deed the rents, issues and profits of the premises, during the period of redemption, were expressly pledged as security for the indebtedness; and that Wind had notice of complainant's application for a receiver and did not then, or at any time thereafter, object to Lubis' appointment as receiver. Under these circumstances we think that the court was fully justified in appointing a receiver without requiring complainant to give a bond. And it appears that the appointment was properly made, save only that the court in the order of appointment failed or neglected to incorporate in said order the statement that the court was of the opinion that a bond by complainant should not be required. And we are unable to hold that, merely because of this failure or neglect on the part of the court, the balance of the moneys in the hands of the receiver, which in equity clearly belongs to complainant, should be turned over to Terwell. If Wind had any valid objections to the receiver's possession, and to the collection by the receiver of the rents for the benefit of complainant, we think he should be held to have waived them by his

failure to object during a period of over two years during which the receiver was acting under the court's order. And, surely, Terwell, as a purchaser from Wind, as late as January, 1933, can have no greater rights than Wind. Accordingly the petition for a rehearing is denied.

PETITION FOR REHEARING DENIED.

Fitch, P. J., and Barnes, J., concur.

39482

J. J. BAUER et al.,
Appellees,

vs.

CITY OF CHICAGO,
Appellant.

235 I.A. 618

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

4086

4087

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order enjoining the City of Chicago from enforcing against complainants Sections 960 to 963 of the Chicago Municipal Code, and commonly known as "Manufacturers of Sash, Door, Blinds, Etc." ordinance.

The complainants in the bill are engaged in manufacturing paper boxes, furniture, sash, door, blinds, etc., and they allege that the City is threatening prosecutions against them to recover the penalty provided by Section 963 of said ordinance, for engaging in this manufacturing business without obtaining a license as required by Section 960. The bill represents that the business of complainants is not of that nature which is required to be licensed for the sake of the public health, safety or welfare and that the sections of the Code purporting to regulate such manufacturing are unconstitutional and void.

Upon the filing of the bill a temporary injunction was entered restraining the City from enforcing the sections of the ordinance referred to. Subsequently an answer was filed by defendant asserting the validity of the ordinance as a regulatory measure which should be sustained under the police power; that its purpose is to regulate a business using large quantities of wood, sawdust, and other combustible material in order to minimize the danger of fire and prevent the spreading thereof, and that the license fee is merely to defray costs of licensing, inspecting and regulating the

business from the standpoint of fire safety, and is not unreasonable or excessive; that the ordinance is a salutary measure designed to minimize the dangers of fire within the municipality.

Section 960 of the ordinance issue follows:

> "960. License Required.) No person, firm or corporation shall conduct, manage, operate or carry on any factory for the manufacture of sash, doors, or blinds, the making of paper boxes, cigar boxes or other wooden boxes or packing boxes, or a planing mill, factory or workshop for wood-turning or for the manufacture of portable garages, molding, picture frames, office supplies, fixtures or furniture, within the limits of the City of Chicago, without first obtaining a license as hereinafter provided."

Section 961 provides for the application for a license. Section 962 provides for graduated license fees based upon the number of employees, and section 963 imposes a penalty of a fine for operating without a license. The City claims that the power to pass this ordinance is found in Section 63, 66, 66, 93 and 100 of Article 5 of the Cities and Villages Act, and that the power is expressly and impliedly found in Section 63, by which the city council is given power

> "To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stove pipes, ovens, boilers, and apparatus used in and about any building and manufacturing, and to cause the same to be removed or placed in a safe condition when considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition."

The City has no inherent power to license any occupation, but the power must be found in the charter either expressly granted or as a necessary incident to carry out some power expressly granted. Fetzen v. Chicago, 304 Ill. 227. Power granted to municipal corporations must be strictly construed. Any fair or reasonable doubt as to the existence of the power must be resolved against the municipality. Chicago v. Pettibone, 267 Ill., 573; Lowenthal v. City, 313 Ill., 190. Any ordinance purely a revenue order is invalid. Herb Bros. v. Alton, 264 Ill., 628.

All this is conceded, but the City asserts that this ordinance is not a revenue measure, but is regulatory and should be sustained under the police power. We do not agree with this, but hold that it is purely a revenue measure and therefore invalid. The police powers of the city in a general way are exercised to promote the health, comfort, safety, and general welfare of society. Chicago v. M. & M. Hotel Co., 248 Ill. 264. We search the present ordinance in vain to find any regulatory provisions designed to promote safety or to prevent conditions which might be dangerous in causing or promoting fires. The powers granted by Section 63 above quoted are clearly designed to prevent construction and conditions which will tend to cause fires. But there is nothing in the instant ordinance relating to this subject. Operating under the license imposed would not even remotely affect conditions touching safety from fire. The hazards from fire would be the same with or without a license. It conclusively appears to be merely a measure for revenue only and hence is invalid. Wilkie v. Chicago, 188 Ill., 444.

The City contends that the businesses in question would necessarily involve the accumulation of sawdust, shavings and chips, which would be inflammable and likely to cause fires. This may be true, and proper regulatory measures to prevent this might be valid. Certain other sections of the ordinance contain fire prevention regulations in regard to lumber or box yards and other businesses, but such valid regulations cannot be so connected with the licensing provisions as to make the latter valid. The sections 960 to 965 are revenue measures covering certain specific businesses and are not related to other general ordinances dealing with fire prevention.

There is force in the contention by the complainants that the businesses covered by section 960 are too general, and that the words, any person manufacturing "office supplies, fixtures or furniture," may cover anything used in an office, such as ink,

paper, pencils, and the like.

We are also impressed by the criticism of the provision in section 961, making it the duty of the city collector "to investigate as to the reliability of the person, firm, or corporation making such application, and if such investigation shows that such applicant is reliable" he shall be recommended for a license. The word "reliability" is too indefinite. It may mean a variety of things. To grant a license upon the sole recommendation of the city collector as to the "reliability" of an applicant is to delegate to that officer an arbitrary power which is unconstitutional. The People v. Sholem, 294 Ill., 204; May v. Chicago, 309 Ill. 342.

For the reasons above indicated we hold that the ordinance is invalid. The temporary injunction properly issued and it is affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

power, insofar, can be said.

To conclude: Determined by the definition of the power-
ship in section VII, insofar as the idea of the self-determine the
interest, it is in the possibility of the dreamer, then, or personal
time matter much qualitatively, and if such investigation there that
such sufficient is "validity" to which be recommended for a dreamer.
The idea "validity" is the reflection. It not even a variety
of ideals. To great a dreamer some the sole recommendation of the
city without is to the "possibility" of an sufficient is to dis-
cuss to that without or sufficient power which is commendation.
THE FINDS - THERE, THE TIME, THIT BEE TO DEFINE, THE IDL, THE.

For the reason there definite we that that the qual-
ness is insofar. The commonly intuition commonly lesson and
it is written:

AMPHOS

Bonjour ma dreamer, ..., Amour.

58 - 38706

4066

CITY OF CHICAGO,

Appellee,

v.

T. C. DUBE, doing business as Grand Crossing Boiler Works,

Appellant.

235 I.A. 618

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 30, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The City of Chicago filed a praecipe and statement of claim in a quasi-criminal action against T. C. Dube, owner of the Grand Crossing Boiler Works seeking to recover the maximum penalty of $200.00 on account of the alleged violation by the defendant of certain sections of the Municipal Code of 1911. The defendant executed a jury waiver, in writing, the case was submitted to the court and after hearing, the defendant was found guilty and a fine of $50.00 imposed, to reverse which he has prosecuted this appeal.

Plaintiff in its statement of claim alleged that the defendant had violated the provisions of sections 1425-1433 of the City Code of 1911 in that he "failed to abate nuisance of noise from pneumatic hammer to occupants of buildings in vicinity".

The evidence discloses that the defendant operated a boiler works located at No. 1244 E. 73rd Street, Chicago, and in theprosecution of his work used an air compressed hammer which made considerable noise in the process of rivet-

Opinion filed Oct. 30, 1924.

ing boilers which the defendant was making. It further appears that defendant's plant had a frontage of 80 feet on 73rd Street and a depth about 125 feet. A number of the witnesses testified forboth parties as to the nature and character of the noise made by the operation of the hammer, but since we have reached the conclusion that there must be a re-trial of the case, we will refrain from commenting upon the testimony of the several witnesses.

Counsel for the defendant contends that the court erred in assessing the fine against the defendant because the sections of the ordinances mentioned in the statement of claim were not introduced in evidence and that this court will not take judicial notice of the ordinances. It has long been settled that the defendant's contention in this respect is not in accordance with the law. The Municipal Court is required to take judicial notice of the ordinances of the City of Chicago and a party appealing from a judgment rendered by the Municipal Court for a violation of a city ordinance, if he wishes to contend that the evidence does not support the judgment must incorporate the ordinance in the bill of exceptions or by some other method bring it before us. City of Chicago v. Noonan, 204 Ill. App. 196; City of Chicago v. Salsh, 207 Ill. App. 50; Kirby v. Chicago City Ry. Co., 260 Ill. 478. But when the defendant offered the ordinance on the trial, the court held it inadmissible, because he would take judicial notice of it. We think the court was wrong in this respect. While it is true that the court would take judicial notice of the ordinance, yet in case of an appeal, the ordinance should have been incorporated into the record.

It appears from the evidence that the defendant has been operating a boiler works at the place on 73rd street for more than twenty years passed, and if the judgment of the Municipal Court is affirmed, the effect of it may be that the defendant will be required to close up his boiler works and move to another locality so that it is apparent that this is a very important case for the defendant,- much more than the $50.00 fine imposed. It is also important as to the city if, as a matter of fact, the noise made by the hammer is so great as to constitute a nuisance. The business conducted by the defendant is a lawful business and the mere fact that the operation of the boiler works is productive of noise does not per se render it a nuisance. In considering whether the noise caused by the operation of the hammer was a nuisance, it is necessary to take into consideration the nature of the business, its location, themanner in which it is conducted, the hours of its operation, the character of the noise and all other attendant circumstances. The operation of such a business might be a nuisance in one locality, while in another locality, it would not be so considered. 21 Am. & Eng. Ency. of Law, 2nd Ed.; Robinson v. Baugh, 31 Mich. 290. But the fact that the defendant had operated his boiler works at the same place for twenty years and at a time prior to other buildings being erected in the neighborhood does not mean that it may not afterwards become a nuisance which the court on proper showing would abate. Cohler v. Levy, 234 Ill. 595.

While there was some evidence as to the character of the buildings in the neighborhood, yet this matter was not gone into in any thorough manner. It was an important element to be

It appears from the evidence that the defendant is a
been operating a boiler house at the place in this case since the
year than twenty years passed, and if the judgment of the
Municipal Court is affirmed, the effect of it may be that the
defendant will be prevented from doing so by his boiler house and
made to suffer loss only on that it is believed that this
is a very disastrous case for the defendant, and more than the
public for their interest. It is very important e.g. the step
of, to a lapse of time, the value also of the benefit is of
great as to constitute a nuisance. The business conducted by
the defendant is a useful business and the mere fact that the
operation of the boiler house is prejudicial to persons does not
make it a nuisance. In considering whether the place
occupied by the operation of the business is a nuisance, it is
necessary to take into consideration the nature of the busi-
ness, the locality, therein in which it is conducted, the
nature of its operation, the convenience of the persons and all other
attendant circumstances. The conducting of such a business must
be a reasonable use and locality, which be another question, it
would not be an nuisance. In the Court's opinion, of long, that it
Jackson v. Bauer, 21 Ohio, 499. But the fact that the litigan-
ts had operated the boiler house at the same place for twenty
years has not a bar since to other litigants being entitled to
the injunctional does not mean that it is not not determine whether
a nuisance which the court is power granting which right.
Jackson v. Lane, 108 Ill. 288.

Title from and that evidence as to the character of
the building in the neighborhood, yet this little for the year
long in our Township Society. It has an inherent element to be

considered. The evidence discloses that the plant is located on property immediately adjoining the Illinois Central R. R. tracks and evidence was offered tending to show that the railroad trains in this vicinity made a great noise. Upon objection the court ruled this evidence immaterial. The court stating "Well, because some one else is creating a nuisance and they don't happen to be defendants here at the same time, that is no excuse." In this the court erred. Evidences of other noises should have been admitted so that the court could determine the character of the neighborhood, because as already stated, what amounts to a nuisance in one neighborhood would be entirely innocuous in another neighborhood.

There was some evidence offered which indicated that there were other factories in the neighborhood, but the matter was not gone into throughly. There is an intimation that this was a factory district and that the defendant had a license issued by the city to operate this plant. On a retrial of this case all of the ordinances should be incorporated in the record, and evidence, if it is offered, as to the character of the buildings and business in the neighborhood as well as the noise caused by the operation of the hammer and the Illinois Central R. R. trains so that the court may intelligently pass upon the question.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, J. CONCUR.

72 - 28722

4089a

235 I.A. 618

ACME PETROLEUM COMPANY, a corp., Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
WESTERN OIL CORPORATION, Appellee.	Opinion filed Oct. 30, 1934.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $812.73 which it claimed on account of business transactions had between the parties. The defendant denied the liability and filed a setoff claiming a balance of $350.75. There was a trial before the court without a jury. The court found the issues against the plaintiff on its claim and against the defendant on the setoff and dismissed the suit at plaintiff's costs, to reverse which plaintiff prosecutes this appeal.

Plaintiff's statement of claim alleges that it and the defendant had certain business transactions and that in the month of March, 1931, the defendant issued its five credit memoranda, evidencing the fact that the defendant owed the plaintiff $812.73. The credit memoranda are attached to and made a part of the statement of claim; four of them are dated March 5, 1931, and one March 28, 1931, and are for the following amounts; $116.38; $83.81; $60.61; $318.04 and $233.27, which makes a total of $830.11 and not $812.73 as plaintiff avers in its statement of claim. The defendant filed an affidavit of

merits in which it admits the issuing by it of the five credit memoranda set forth in plaintiff's statement of claim and avers that it was the custom of the trade to hold such credit memoranda until a balance was struck or a settlement between the parties made. The defendant further set up that the parties had been doing business for a long time prior to the issuance of the five credit memoranda in various business transactions consisting of the purchase and sale of cars of oil, freight and demurrage charges, and then sets up several items with which it charges the plaintiff covering the years of 1930 and 1931 aggregating $3,801.58 and from this amount it deducts plaintiff's credits aggregating $3550.83, leaving a balance due from the plaintiff to the defendant of $250.75. The defendant then filed a setoff which was in substance the same as its affidavit of merits. To the setoff the plaintiff filed an affidavit of merits that ithad a good defense to the whole of the defendant's setoff; that during the years 1930 and 1931, the parties had several business transactions, as a result of which a controversy arose as to how the account stood; that on February 3rd, 1931, the parties met for the purpose of settling and adjusting their accounts; that the various items were then checked over by both parties, showing a balance of $1453.98, due from the plaintiff to the defendant which was paid to the defendant and accepted by the latter in full of all demands to that date.

The five credit memoranda upon which plaintiff basis its claim were issued by the defendant to the plaintiff, showing that the latter owed the former the sums above mentioned for freight charges, shortage in quantity of oil and

other similar charges.

Counsel for defendant state that the court found that all accounts between the parties had been settled and determined on February 3, 1921, and therefore that neither party could recover. While the position of the plaintiff is that the court did not find that there was an accord and satisfaction, because the trial judge refused to hold propositions of law tendered by it to that effect. We have examined the record and find nothing that would give us any light as to what the trial judge's views were and while under our practice, it is not necessary that the trial judge's views should appear from the record, yet we often find it of great assistance where the trial judge does express his views.

There is little or no conflict in the evidence. It is to the effect that the parties had had several business transactions in the purchase and sale of oil; that there were claims for freight charges, demurrage and other items which were in dispute; that prior to February 2, 1922, plaintiff received two cars of oil from the defendant and on that date wrote the defendant at its Chicago office, its main place of business being in Oklahoma, the following letter: "Following up our conversation of today regarding the remittance covering two cars of naphtha shipped for our account to Shamrock, Okla. We are not refusing to pay for this oil, inasmuch as it is a legitimate purchase, but we must insist that your company pay us what they owe us. It is disgusting the way your Tulsa office handles our different claims. Mr. May seems to have taken an arbitrary stand on everything. We will give you our check for the two cars of naphtha less our account against your concern and that is being paid for

where reality begins.

Perhaps the distinction which that the court found that all immunity attaches the written fact were written and delivered on February 3, 1971, and it appears that written proceedings begin therefore. Since the written of the defendant's be that his report did not time that Mr. Ryan's was the client and relationship, without the still judge retained to take depositions of the witnesses by in the jury trial. It also indicated the statutory fact nothing only a case on the light to be what the judge's view was not with woman and reality, it is not necessary that the trial judge's view should change the jurisdiction but the judge's view should change the trial judge that unless the view.

Where is truth or is reality in the witness. It is to his office that the petition for a certain business transaction in the province and this is it not; that have not a claim the Fredrick analysis, Immunity and other issue to be discussed that prior to February 5, 1971, initially evaluating the case of all from the defendant and on that date when the interview had at the Sierra office, the main claim of business value is Alabama. The following issues: "Finding of the wrongdoer of judge regarding the Fredrick attorney for the of business relations for the business." 1974. It is not without a jury for the jury trial. Immunity at it is a fundamental protection but no more than the jury. Immunity is not only for the defendant to discredit the by the jury. Since action against the attorney relations. Mr. Ryan would be here from the statutory right to immunity. It will give reasons which the the jury case of reality

with the understanding that the naphtha shipped us is exactly according to specifications and full gallonage.

"If you want to take our remittance as above stated we would be glad to give it to you but we must insist that our account is deducted."

On the next morning, February 3, 1921, a Mr. Jones, the Chicago representative of the defendant, called on plaintiff in reference to the matter. The evidence discloses without contradiction that all of the items mentioned in the defendant's setoff were checked over, at that time, as well as all of the items claimed by the plaintiff to be due it from the defendant. And according to plaintiff's contention there would be due from it to the defendant the sum of $1423.98, which included payment by it of two cars of naphtha; that plaintiff's representative there stated that they would give a check to the defendant for that amount, provided it was accepted in full. Mr. Jones stated he was not authorized to accept the check in full, but that he would take it and send it to the home office in Oklahoma and advise the defendant of the condition under which the check was tendered. Plaintiff at that time gave Mr. Jones a voucher check payable to the defendant for $1432.98, which bore an endorsement "in full of all claims to date," and also gave to him an itemized statement of the same date, showing the items with which plaintiff had charged the defendant, aggregating $1323.34. They also gave Mr. Jones at that time another statement of the same date, showing the amount the plaintiff owed the defendant, the deductions it had made therefrom and the net amount for which the check was given.

The evidence further discloses that the Chicago representative of the defendant enclosed the check together with the two statements and plaintiff's letter of February 2nd above quoted, together with a letter from the Chicago representatives which is not in evidence. Before the check was sent it was certified in Chicago and afterwards deposited and cashed by the defendant. On February 7th the defendant from Oklahoma wrote plaintiff referring to plaintiff's letter of February 2nd and the deduction of $1323.34 and made some objection to two small items. Afterwards the parties had no further business transactions in the buying and selling of goods, but on March 5th and March 28th following, the defendant issued its five credit memoranda upon which plaintiff's claim is based. Counsel for defendant argues that there was no accord and satisfaction on February 3, 1951, because nowhere in plaintiff's letter of February 2nd is there any statement that the check for $1432.98 was to be tendered in full. It is obvious that this argument is unsound, because the letter was written the day before the check was given and there was no mention in the letter of giving the check at all. It was the next day, February 3rd when the representatives of the two parties met and, after checking all of the items, plaintiff agreed to give its check to the defendant, provided it was accepted in full. Counsel for the defendant in their brief say "If nothing had occurred in this transaction, but the sending of the check with the notation 'in full of all claims to date' appellee stated that under the law it would be conclusive, but the check was accompanied by this letter of February 2nd. The letter flatly contradicts the notation."

Of course the letter of February 2nd as above quoted, was written the day before the parties reached the agreement, and since the record discloses that the letter of February 2nd was sent by the Chicago representative to the defendant at Tulsa, together with another letter written by the Chicago representative which does not appear in evidence, it is clear that the defendant when it obtained the check knew that the plaintiff was disputing a number of items, and was deducting them and that the check was tendered in full, and since counsel for the defendant concedes that under the authorities the check if accepted as tendered by plaintiff would amount to an accord and satisfaction, we think it clear that there was an accord and satisfaction when the defendant at Tulsa cashed the check.

But counsel for the defendant further contends that even if there were an accord and satisfaction, it must apply to the five credit memoranda, because the evidence shows that these were issued by the defendant upon business transactions between the parties, which occurred prior to February 2nd. The evidence discloses that on February 3rd when the parties were checking over the several items, the five items in question were not considered at all and at that time it was impossible for either of the parties to know anything about them. It is obvious, therefore, that these items were not included in the accord and satisfaction, and since there is no dispute but that these five items were correct, the plaintiff was entitled to his judgment for the amount they showed the defendant owed, which was $320.11. But, since plaintiff swears that the amount of $313.72 is the amount it claims in its statement filed, the judgment of

the Municipal Court will be reversed so far as the finding was against plaintiff's claim only, and judgment will be entered in this court in favor of plaintiff and against the defendant for $812.73.

JUDGMENT REVERSED AND JUDGMENT HERE.

THOMSON, J. AND TAYLOR, J. CONCUR.

28 - 28737

MARY MAVEN AND MARGARET MAVEN, Administratrices of the Estate of Margaret MAVEN, Deceased, Defendants in Error,	235 I.A. 618
v.	ERROR TO SUPERIOR COURT, COOK COUNTY.
JOHN TRAVNICEK AND FRANK G. SKALE, Plaintiffs in Error.	

Opinion filed Oct. 30, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendants to recover damages for the wrongful death of the deceased Margaret Maven. There was a trial before a judge and a jury and a verdict in favor of plaintiff for $6,000.00. The court required a remittitur of $1,000.00 and judgment was entered for $5,000.00.

The record discloses that about nine o'clock on the evening of October 30, 1920, Margaret Maven, a woman about 82 years of age, while walking in an easterly direction across South Western Boulevard at or near its intersection with 36th Street in the City of Chicago was struck by an automobile which was being driven north in the Boulevard by Frank Skale. She was severely injured and died on the 13th day of February, 1921. This suit was brought to recover for the benefit of her next of kin, it being claimed that the deceased died as a result of the injury she received.

Witnesses for the plaintiffs testified to the effect

that about nine o'clock on the evening of October 30, 1930, they saw Margaret Haven as she started to walk east across South Western Boulevard on the north crosswalk of 38th street; that when she was about 10 feet from the east curb she was struck by a northbound automobile traveling from 25 to 30 miles per hour; that it was being driven by the defendant Skale; that after the automobile struck Mrs. Haven, it carried her from 50 to 75 feet north when it was stopped. She was picked up and it was found that she was bleeding from the head and appeared to be otherwise severely injured. She was placed in an automobile and taken to a doctor's office. The witnesses further testified that the intersection was fairly well lighted and there was no other traffic in the street, except the automobile which struck the deceased. On the other hand witnesses for the defendant gave testimony to the effect that at the time in question, the traffic in the boulevard was very heavy, a great many automobiles passing in both directions; that Mrs. Haven stepped off of the west curb into the roadway of the boulevard at or near the north crosswalk proceeding in a northeasterly direction; that she passed behind two southbound automobiles and in front of the automobile which was driven by Skale; that she was struck about 50 to 75 feet north of the north crosswalk; and that the automobile that struck her was going at the rate of 12 to 14 miles per hour.

The evidence further discloses, that upon examination, it was found that Mrs. Haven had sustained a fracture of the right femur and both bones of the left ankle; that she had received a cut or wound in the head which bled quite freely and was otherwise injured; that she was treated by different doctors

and that a day or two before she died she was suffering from hypersatic bronchial pneumonia; that from the time she was injured until she died she suffered a great deal which caused her to be in a weakened condition; that prior to the time she was injured her health was good; that she was keeping house for four of her six children who were living with her; that one of her daughters who was living at home was more or less an invalid; that she left her surviving the following children: Mary, 35 years of age; James,31 years; Thomas, 29 years; Margaret, 27 years; John, 24 years; Edward, 19 years. The evidence further shows that the automobile was owned by the defendant John Travnicek, who was the father-in-law of Skale; that Skale was taking his wife, mother-in-law and brother-in-law, who was fourteen years old, for a ride; that the street was dry and the evening pleasant; that after Mrs. Maven was taken to a doctor nearby, she was then taken to a hospital where she was confined to her bed until a few days before Christmas; that she was taken home and that after a few days was able to sit up for a short time; but was again confined to bed continuously until she died.

In addition to the general verdict in favor of the plaintiffs and against the defendants, the jury at the request of the defendants answered the following special interrogatory in the negative. "Was the death of Margaret Maven the result of causes other than the injury received when she was struck by the automobile driven by Frank O. Skale, defendant herein mentioned."

1. The defendants contend that the court should have directed a verdict in their favor as requested, because the evidence failed to show any causal relation between the injuries which Margaret Haven received and her death. The argument seems to be that none of the doctors gave an opinion that the injuries caused her death; that none of the doctors testified that the injuries caused the bronchial pneumonia which was the immediate cause of Margaret Haven's death. In this connection defendants' counsel state that one of the doctors merely testified that the injuries which the deceased received might be sufficient and could cause hypostatic bronchial pneumonia and that the doctor further testified that such bronchial pneumonia might be contracted from a cause independent of the injuries which she received. And it seems to be contended that because none of the doctors testified that the injuries did in fact cause the pneumonia that no recovery could be had because the jury was left to speculate and conjecture as to the cause of death. This argument is based on a misapprehension of the law. It would have been improper for counsel for plaintiff to have asked the doctors whether in their opinion the injuries from which the deceased died caused the pneumonia. The proper question was whether in the doctor's opinion, it might or could have caused the pneumonia. Kimbrough v. Chicago City Ry. Co., 278 Ill. 71. The question was proper because it did not invade the province of the jury and the question as to whether the injuries did cause the defendant's death was properly left to the jury for their determination. In such a case demonstration is not required but responsibility must be determined upon a reasonable conclusion to be determined from the evidence. Union Pacific R. R. Co. v.

Huxoll, 245 U. S. 535.

2. Defendants further contend that the damages awarded are excessive and a number of authorities are cited, most of which were rendered many years ago. When the Legislature passed the Injury Act, the maximum that could be recovered in any case was $5,000.00. Subsequently this was increased to $10,000.00. The evidence shows that the plaintiff was about 62 years of age; that she was a strong and healthy woman prior to her injury, doing her own house work; that four of her children lived at home with her. We cannot be unmindful of the fact that the money value of health and life has been appreciating and the purchase power of money depreciating during recent years. Without deciding whether the amount is larger than we would have awarded had the responsibility been ours, we think it is not so excessive as to require interference on our part. Tosch v. Chicago Railways Co., 331 Ill. App. 241; Deloheny v. Quinlan, 210 Ill. App. 331; Girdzum v. Van Etten, 211 Ill. App. 533; Fillippi v. Spring Valley Coal Co., 208 Ill. App. 61.

3. The defendants further contend that there was no proof of due care on the part of the deceased for her own safety and that the verdict finding that she was not guilty of contributory negligence is against the weight of the evidence. Counsel then analyze the evidence of the several witnesses and say: "It is evident that either there was lots of traffic on the boulevard and deceased took a diagonal course across the boulevard as described by defendants' witnesses in which event she would be guilty of contributory negligence or else there was only the auto driven by defend-

out Skale and she got to the center of the boulevard and stopped and then started across in front of the auto that hit her and got to within five feet from the east curb of Western Boulevard when she was struck."

We have carefully considered all the evidence in the record and we are of the opinion that whether the deceased was in the exercise of due care for her own safety was a question for the jury. There was evidence tending to show that prior to being struck Mrs. Haven was walking east on the north crosswalk; that there was no traffic in the street except the automobile being driven by the defendant Skale; that it was traveling at the rate of 25 to 30 miles per hour; that no horn was sounded; that, as it approached Mrs. Haven, the machine swerved back and forth. The question whether the deceased was in the exercise of due care for her own safety, under the circumstances, was for the jury to determine.

5. Complaint is also made that the court erroneously instructed the jury to the effect that it was admitted that both of the defendants were in possession and control and were operating the automobile at the time and place in question. And the jury were then told that if, under the evidence and instructions, they found that the plaintiffs were entitled to recover against one of the defendants, they should also find that they were entitled to recover against the other defendant. It seems to be argued that this was erroneous and prejudicial, because the jury might well have found one of the defendants guilty and the other not guilty. The evidence discloses, however, that the automobile was

owned by Travnicek and that the defendant, Skala, his son-in-law, was taking members of both families for a ride. It was charged in one count of the declaration that the defendant Travnicek owned and controlled the automobile, and that the defendant Skala was operating it under his direction and control. In these circumstances the jury could not consistently find in favor of one defendant and against the other, if under the law both the master and servant could be held liable in the same action, which we do not decide, because the point has not been made. Johnson v. Magnuson, 88 Ill. App. 448; Herman Berghoff Brewing Co. v. Przybyski, 83 Ill. App. 361; McNamar v. John, 116 Ill. App. 31.

Defendants further contend that the court erred in refusing an instruction offered by the defendant by which it was sought to tell the jury that under the statute of Illinois neither of the defendants could testify and, therefore, the fact that they did not testify should not be considered by the jury in arriving at their verdict. We think the defendants were entitled to have this instruction given, but think the error would not warrant us in disturbing the judgment, because it appears that the defendant Skala took the witness stand in his own behalf and upon objection by counsel for plaintiff, the court refused to permit him to testify and it was expressly stated that the statute prohibited him from testifying in the case so that it appears that the jury knew the reason why the defendants did not take the stand.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

97 - 28748

BENJAMIN M. LIPNOFF,

Appellee,

v.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant.

235 I.A. 619

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

Opinion filed Oct. 30, 1934.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant to recover $1,000.00 claimed to be the value of a diamond ring which he alleges had been stolen from him and which he claimed was covered by a policy of insurance issued by the defendant. At the close of plaintiff's case defendant moved for an instructed verdict, but the motion was overruled. It refused to put in any evidence and the case went to the jury on the evidence submitted on behalf of the plaintiff. There was a verdict in plaintiff's favor for $900.00, a remittitur of $30.00 and a judgment entered for thebalance, $870.00, to reverse which the defendant prosecutes this appeal.

The suit was commenced December 13, 1931, and the declaration filed January 18, 1932. The policy was set out in the declaration in haec verba. It was dated December 7, 1930 and was for a period of one year. The amount of insurance was $1,000.00. It was alleged in the declaration that plaintiff was robbed of a diamond ring which was covered

by the policy on January 10, 1921, and that the value of the ring was $1,000.00; that on the date of the robbery he notified the police of Chicago that he had been robbed of the ring and that on the 18th day of January, 1921, he made proof of the loss to the defendant as required by the policy. To the declaration the defendant filed four pleas: (1) the general issue; (2) that the plaintiff ought not to recover because the suit was not filed within one year of the date of the loss as required by the policy. This plea ended with a verification. (3) that the plaintiff ought not to recover because the defendant "did not make and deliver a writing * * * as is in the declaration mentioned." Following these three pleas, there was an affidavit by one of the defendant's counsel "that he was one of the attorneys and the agent for the defendant * * * ; that the foregoing plea is true in substance and in fact." It was averred in the fourth plea that the plaintiff had not been robbed of the diamond ring on January 10, 1921; that the ring was not of the value of $1,000.00 as alleged in the declaration; that the plaintiff did not within three months after the loss of the ring make proof of the loss as the policy required; that he did not on January 10, 1921, notify the police of Chicago of the robbery.

The case went to trial June 5, 1923, with the pleadings as above stated. No issue being joined on the second plea. After a jury was impanelled, plaintiff's counsel moved the court for leave to amend the declaration so as to show that the robbery had taken place on December 25, 1920; that he had notified the police on that

date of the robbery and made proof of the loss on December 27, 1920. Counsel for the defendant objected to the court allowing the amendment and the court stated that ifthe defendant was taken by surprise a juror might be withdrawn and the case continued. After considerable discussion between the court and counsel, it seems to have been agreed that there was no objection to plaintiffs filing an amended declaration, provided the pleas on file stood as pleas to the amended declaration and this was accordingly done.

Plaintiff offered evidence tending to show that robbers had forcibly taken the ring from him on December 25th; that he immediately notified the police of the fact; that on the 27th of December, two days following the robbery, he went to the defendant's office in the Continental and Commercial National Bank Building, Chicago, saw an adjuster of the company and advised him of the circumstances under which he had lost the ring; that he was there given a blank on which to make proof of loss; that he took the blank to a notary public in the Krause State Bank and had it filled out, then took it back and gave it to a representative of the defendant; that he had made repeated demands that defendant pay in accordance with the terms of the policy, but the demand was refused. The policy was also offered in evidence. Plaintiff testified that he owned the ring about three months before it was taken from him "that he bought it from the Maiden Lane Jewelry Company, 1436 Milwaukee Avenue." Upon being asked the value of it, objection was sustained to

the question for the reason that the witness showed no qualifications. He was then asked by his counsel, "How much did you pay for the ring. Answer $270.00." He testified further that the stone was a blue white diamond and weighed one carat and sixty-eight points.

1. The defendant contends that the suit was barred because the policy provided that the suit should be commenced within a year after loss; that the amended declaration was not filed until more than a year after the robbery, and that it set up a different cause of action from that alleged in the original declaration. We think the point is not properly preserved for review. The record discloses that the suit was commenced December 13, 1931. The declaration averred that the robbery had occurred January 10, 1931. To this the defendant interposed a plea that the plaintiff ought not recover because the suit was not filed within one year from the date of the loss as the policy provided. This plea ended with a verification and the proper procedure would have been to demur. Of course, it was bad, because the record disclosed that the suit was brought December13, 1931, and the robbery was alleged to have taken place January 10, 1931. This was within one year and the plea was bad, but neither party took any notice of the fact that the cause was not at issue when they went to trial. It was not brought to the attention of the trial judge, and after the jury had been selected, the plaintiff was given leave to amend his declaration as above stated, and the defendant was allowed to have his pleas on file stand as pleas to the amended declaration. It was not even then pointed out that the case

was not at issue and no notice was brought to the trial judge that the plea was not disposed of. By thus going to trial the plea was waived. This is a court of review to correct any errors committed by the trial court and it is obvious that the trial court could not have committed any error in this respect when it was not brought to its attention. Moreover, we think there is no merit in the contention because the policy set up in both the original and amended declaration was the same as well as the loss claimed to have been suffered by the plaintiff. If the defendant was taken by surprise, he might have had a continuance as the trial court suggested to counsel. The same cause of action in substance was alleged in the original declaration.

2. The defendant also contends that no proof was made by plaintiff of the execution of the policy by the defendant, and that such proof was necessary because the defendant, under oath, had denied the execution of the policy. If we assume that the plea denying the execution of the policy was properly verified, the proper way for plaintiff to prove, in addition to what he did, was that representatives of the company signed the policy.

There was not sufficient evidence to establish the fact that the plaintiff had made proof of loss. He claims to have been given a blank to fill out; that he took it away, filled it out and returned it to the defendant. No notice was served on the defendant to produce the proof of loss as alleged to have been made. No evidence was offered at all as to the contents of such alleged proof of loss. We are also of the

opinion that the evidence was insufficient to warrant the judgment as to the value of the diamond ring. As we have stated the only evidence was that given by the plaintiff that he bought the ring about three months before the robbery from the Maiden Lane Jewelry Company, 1436 Milwaukee avenue and paid $670.00 for it. It does not appear that this jewelry company was carrying on a business of selling diamonds or any other business or that the purchase was the ordinary business transaction, and there was no evidence as to the value of the ring except as stated. And while we have held that in ordinary business transactions, nothing appearing to cast suspicion on the fairness of the price paid, that the price paid is sufficient prima facie to establish the value of the article purchased. Sears Roebuck & Co. v. Sears, Slayton Lumber Co., 236 Ill. App. 287 and cases there cited; Travis v. Pierson, 43 Ill. App. 579; Cloyes v. Flaatie, No. 28074, Appellate Court, First District; Wholesale Grocers Corporation v. Richheimer Brokerage Company, No. 28313, Appellate Court, First District, yet we think that in the instant case it was incumbent upon plaintiff to produce more evidence as to the nature of the transaction to prove the value of the ring in question.

We have considered the other points made by the defendant, but find them without any substantial merit.

For the errors indicated, the judgment of the County Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, J. CONCUR.

121 - 38773

HARRY A. MASSEY, doing business as HARRY A. MASSEY & CO., for use of CHICAGO TITLE & TRUST COMPANY, as Trustee in Bankruptcy of HARRY A. MASSEY & Co.,

Appellant,

v.

W. W. TATE,

Appellee.

235 I.A. 619

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 30, 1934.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $4169.50, on account of an alleged loss claimed to have been suffered by plaintiff in the purchase of stock as a broker for a Mrs. Pauline Potter, which loss plaintiff claimed the defendant had guaranteed to pay. There was a trial before a judge and a jury and a verdict and judgment in defendant's favor, to reverse which plaintiff prosecutes this appeal.

Plaintiff in his statement of claim alleged that he, as a stock broker, bought for Mrs. Potter 300 shares of Ray Consolidated Copper Company on the 26th day of July, 1919, at the market price of $36.75 per share; that the purchase was made at the special instance and request of the defendant and upon defendant's guarantee to plaintiff against any loss which might occur to him by reason of the purchase and carrying of such stock; that in confirmation

of such guarantee, the defendant on August 7th wrote and delivered to plaintiff a guarantee in the form of a letter. It was addressed to plaintiff signed by the defendant and is as follows: "Referring to the three hundred shares of Ray Consolidated Copper that you purchased at 26 3/4 for the account of Mrs. Pauline Potter, I will guarantee you against any loss on this transaction. I am making this guarantee with the understanding that you are not to sell this stock without first conferring with me." It is further alleged, in the statement of claim, that the market value of the stock declined after the purchase of it and that plaintiff continued to carry it; that in the month of October, 1930, he requested Mrs. Potter and the defendant to accept the stock and pay the purchase price thereof including expenses and carrying charges; that Mrs. Potter was financially unable to do so; that at the request of defendant plaintiff continued to carry the stock until May 23, 1931, when he notified defendant that he would on the 27th of May, 1931 deliver the 300 shares of stock to the defendant and would request the defendant to pay purchase price and carrying charges; that afterwards on the 27th of May, 1931, he tendered the stock and certificates to the defendant and that the latter refused and declined to accept or pay for them.

The defendant filed an affidavit of merits to the whole of plaintiff's demand and averred that he did not request the plaintiff to purchase the stock; that such purchase was not made at his request, nor upon defendant's guarantee against any loss which might accur to plaintiff by reason of the purchase and carrying of the stock. Defendant further

set up that he executed and delivered the letter of August 7, 1919, which is above quoted, but denied that it was executed pursuant to any verbal agreement or understanding made prior to August 7, 1919; that plaintiff did on or about May 27, 1921, offer to deliver the stock certificates to the defendant and requested the defendant to pay therefor, the purchase price and carrying charges; that the defendant declined to accept or pay for the stock or any part thereof; denies that defendant was in any way obligated to plaintiff and avers that the stock certificates when offered to be delivered by plaintiff were not in proper form to transfer the title of them to the defendant.

It is further set up in the affidavit of merits that the defendant signed and delivered to the plaintiff the instrument in writing which was set forth in plaintiff's statement of claim, and averred that defendant's undertaking was conditional upon the expressed agreement between plaintiff and defendant that plaintiff would not sell the stock until after conferring with the defendant and upon the further condition that plaintiff would discontinue trading with Mrs. Potter, who had prior thereto suffered great loss in trading in various stocks and commodities with plaintiff; that after the delivery of the writing to the plaintiff, the latter continued to deal in stocks on the account of Mrs. Potter, as a result of which Mrs. Potter being inexperienced in such trade lost a large amount of money; that as a result of plaintiff's breach of the agreement entered into between the parties, the consideration had wholly failed; that plaintiff had sustained no loss on account of the purchase by him of the stock,

because the stock had not been sold by plaintiff but was still held by him.

Other matters are set up tending to show the transactions between plaintiff and Mrs. Potter were illegal, but since no proof of them was made on the trial, it is unnecessary to refer further to the allegations in the affidavit of merits.

We think the evidence establishes that plaintiff on July 22, 1919, purchased for Mrs. Potter 300 shares of capital stock of the May Consolidated Copper Company, and that the plaintiff became obligated to pay $26.75 per share; that plaintiff continued to hold the stock from the date he purchased it until after the beginning of this suit; that subsequently the stock was sold, but at what price it does not appear. It further appears from the evidence that during March or May, 1921, plaintiff tendered the stock certificates to the defendant and demanded payment of the purchase price, together with brokerage fees and other charges; that the defendant agreed to pay the purchase price, provided the stock certificates were properly endorsed, but refused to pay any brokerage fees or carrying charges. It further appears without dispute, that plaintiff was engaged in the brokerage business in Chicago and that Mrs. Potter had been dealing with him from 1915 until May, 1920; that on account of such transactions plaintiff was credited with more than $164,000.00 and debited with the sum of $35,000.00 more than that amount, as shown by plaintiff's books.

Plaintiff testified in his own behalf that he talked

with the defendant over the telephone July 28, 1919; that at that time plaintiff told the defendant that Mrs. Potter was in plaintiff's office and had spoken to him about buying some stock of the Ray Consolidated Copper Company which she said the defendant had recommended; that the defendant replied that he had spoken to Mrs. Potter about the stock and that if plaintiff would buy the stock for her, the defendant would guarantee plaintiff against any loss; that plaintiff thereupon told the defendant he would do so. Plaintiff further testified that the next day he bought 300 shares of stock for $26.75 per share on the stock exchange; that a few days afterwards he talked again with the defendant over the telephone and advised the latter that he had not received the letter guaranteeing the account which defendant had agreed to send plaintiff; that the defendant then said he would attend to the matter; that a few days thereafter on August 7, 1919, the plaintiff again called the defendant on the telephone in reference to the same matter, and defendant asked plaintiff how he wanted the letter worded; that thereupon plaintiff said he would dictate it over the telephone to the defendant's secretary and that he did so; that afterwards he received the letter from the defendant which we have quoted above. Plaintiff further testified that about January, 1921, he went to see the defendant at the latter's office and asked the defendant what could be done about settling up for the copper stock; that the defendant in reply wanted to sell plaintiff $50,000.00 in life insurance and apply the premium on the account, which offer plaintiff refused; that about a week later, he again took the matter up with the defendant and that the latter stated that if he

would wait until the first of February, he would take up the stock that he did not want the stock sold; that he saw him again about March 1st when the defendant said that he would try to take the stock up within two or three weeks; that afterwards about May 20, 1921, plaintiff again saw the defendant in reference to the matter and at that time defendant stated that if plaintiff would discontinue any further dealings on account of Mrs. Potter, he would settle for the stock; that about a month later plaintiff again called and the defendant said that he would again take up the stock, but would not pay any interest; that afterwards plaintiff on May 23rd, 1921, wrote the defendant a letter advising him that on the 27th of May he was going to send over the stock which would be delivered to the defendant upon payment of $8,246.33. The evidence further shows that the stock certificates were sent over to the defendant, but that the defendant refused to pay carrying charges and contended that the stock was not properly endorsed.

At the time of the suit plaintiff had gone into bankruptcy and the suit was brought for the use of his trustee.

On cross-examination plaintiff testified that the stock was not sold until after suit was brought. During this cross-examination, counsel for the defendant interrogated him as to why no demand was made upon the defendant until about January, 1921, to which the witness replied: "There had been no loss why should we have asked him for it." Q. You said there was a loss. A There was not a loss, it was not sold." There was some discussion and the court stated, "Then in the trade is it a loss? A.There wasn't any loss on lots bought and charged, but when we sell a

stock we give credit for what we receive for it less our commission."

The defendant testified in his own behalf that he did not talk to plaintiff over the telephone on July 28, 1918, but that he first talked to him over the telephone August 7, 1919; that he told the defendant on that date that Mrs. Potter was in his office and had told him that plaintiff was about to sell certain stocks which plaintiff had purchased for her which would cause her to lose a great deal of money; that he told the plaintiff Mrs. Potter had sold her piano and diamonds to give him some money; that the plaintiff stated that unless he had margins he would close the account out; that the defendant then replied that he would guarantee the account, provided the plaintiff would not deal any more with Mrs. Potter; that Massey said this would be satisfactory and thereupon Massey dictated the letter set forth in plaintiff's statement of claim over the telephone to defendant's secretary; that it was transcribed and signed by the defendant and sent to the plaintiff; that defendant never heard anything further until about 1½ years later, when Massey came over in regard to the matter; that at that time the defendant asked plaintiff for a statement of Mrs. Potter's account, which was shortly thereafter sent; that upon receiving this statement defendant called plaintiff and Mrs. Potter to his office; that when they were there, the defendant told the plaintiff he had broken faith with the defendant, because the account showed there had been dealings after August 7, 1919. The witness also testified to various demands made upon him for payment and the offer of plaintiff to deliver

the certificate of stock to him; that the defendant refused to pay the carrying charges and expenses and refused to accept the stock, because it was not properly endorsed. Other testimony was offered by the defendant as well as some on behalf of the plaintiff, but in the view we take of the case, it is unnecessary to analyze it further.

Plaintiff first contends that the court erred in admitting the testimony of the defendant to the effect that the agreement made between him and the plaintiff and which was set forth in the written letter of August 7th was upon the further condition that the plaintiff cease dealing further on Mrs. Potter's account, on the ground that this tended to vary the terms of the written agreement between the parties and violated the parol evidence rule. We have examined the record very carefully in this respect and find that no such objection was made upon the trial. There was no intimation during the testimony of this witness, nor during the trial that the testimony given by the defendant in this respect violated the parol evidence rule. Not having made the point on the trial, it is obvious that it cannot be made now.

Complaint is also made by plaintiff to the giving of the instructions on behalf of the defendant. Upon examining the record we find that both parties had prepared what they considered would be proper instructions for the court to give in the event that the instructions given were in writing and apparently handed them to the court, but the court announced he would instruct the jury orally and did so. At the conclusion of which counsel for plaintiff said: "Any

I at this time on behalf of the plaintiff interpose an objection to the giving of the next to the last instruction and to the one preceding that, on the ground that both the instructions improperly state the law so far as the same covers it, in the defendant's interest, that is, they are improper statements of the law." This was the only objection urged to the charge or instructions of the court.

In the record the trial judge certified Rule 8 of the Municipal Court in force at the time as follows: "In any case tried by a jury, if in the judgment of the court the questions involved require it, the court will, before arguments to the jury and out of their presence, confer with the attorneys in the case as to the instructions to be given.

"Objections to the giving or refusing of oral instructions to the jury must be specific and must be made immediately upon the conclusion of the charge and before the jury retire."

Section 37 of the Municipal Court Act (Chap.37) provides "that the court in its discretion may instruct the jury orally or in writing." Under the statute and the rule of the Municipal Court, the only objection that plaintiff can legitimately urge to the instructions is that which counsel made at the close of the instructions and which is above quoted. The objection urged amounts to only that the instructions complained of were not in accordance with

the law. It was not specifically pointed out in what respect the court's instructions were improper and under the rule of the Municipal Court the objection was not valid. In this connection it is also said that the court erred in failing to make "refused" the four instructions offered by the defendant, but which the court refused to give. Counsel for plaintiff made this request after the jury had retired so that it was impossible for the court then to correct his charge. In any event, we think there was no error in refusing them, even if the point was properly before us. The first stated an abstract proposition to the effect that defendant's letter of August 7th was "An absolute guarantee against any loss" to plaintiff by reason of the purchase by him of the stock for Mrs. Potter. It is obvious that this instruction should not have been given because defendant had testified without objection that his guarantee was upon condition that the plaintiff cease dealing with Mrs. Potter. The instruction was contrary to the evidence. The second of the offered instructions was that where parties have had verbal negotiations which have afterwards been reduced to writing, the law presumes that the entire agreement was reduced to writing and that the agreement would control. For the same reason this instruction was wrong. It was not in accordance with the evidence which was introduced without objection. The third instruction was in substance that, under the letter or guaranty of August 7th plaintiff had a reasonable time after the purchase of the stock to offer to deliver the stock certificates to the defendant and to demand from him

the full purchase price including broker's commissions and interest, or that plaintiff had the right to keep the certificates of stock and to demand and recover of the defendant the excess of the purchase price over and above the market price of the stock at the time when the defendant should have accepted the stock, or that plaintiff had the right after giving notice to the defendant to sell the stock to the best advantage and recover of the defendant any loss including broker's commissions and interest.

We think the third instruction was wrong in a number of respects. Under the agreement of August 7th, plaintiff did not have the right to offer to deliver the stock certificates and demand the purchase price. At most under the contract, we think plaintiff should have sold the stock after proper notice and then demanded the balance, if any, still due and owing to him from the defendant. There was no loss within the meaning of the agreement until the stock was sold, and the third proposition mentioned in the instruction was not applicable, because the evidence was that the stock had not been sold. The other instruction was also wrong because, in our opinion, the contention of the defendant that the suit was prematurely brought must be sustained. Plaintiff had suffered no loss within the meaning of the letter of August 7th, unless he failed to sell the stock for enough to pay what was due him. This he did not do, as the stock was not sold until after the suit was brought. The evidence shows that it was sold afterwards, but there was no evidence as to what it brought, or as to whether or not plaintiff had any loss. In this connection counsel for plaintiff in his reply brief states that the defendant's

contention to the effect that the suit could not be maintained because there could be no loss until the stock was sold is unsound, and cites in support of this: Osgood v. Skinner, 211 Ill. 289; Barley v. Findlay, 82 Ill. 524; Trunkey v. Hedstrom, 131 Ill. 204. It is not pointed out how these cases apply. We have examined them carefully and think they are not in point.

In the Osgood case, there was an agreement between the parties whereby certain corporate stock would upon certain conditions be taken back and the par value paid for it. Afterwards the stock was tendered and payment demanded which tender and payment were refused and suit was brought to recover the contract price. It is obvious that that case is not in point. Here the agreement of the defendant was not to purchase the stock but that he would guarantee plaintiff against any loss which he might sustain by reason of having purchased and carried the stock for Mrs. Potter. The Osgood case is not at all applicable.

The Barley case was an action of assumpsit to recover damages sustained for refusing to receive and pay for goods sold by plaintiff to the defendant. This is sufficient to show that the facts are entirely dissimilar to the facts in the instant case.

The Trunkey case was also an action of assumpsit to recover damages alleged to have been sustained on account of the failure to deliver certain coal in accordance with the terms of a contract. It is obvious that this case is not applicable, because defendant never agreed to purchase stock from plaintiff.

Complaint is also made to the ruling of the court on the admission of evidence offered on behalf of the defendant in that it was repeatedly brought out in the evidence that Mrs. Potter was a poor widow who was being financially ruined by plaintiff, a stock broker. A great part of this evidence came from the defendant when he testified to conversations he had with plaintiff. Even if the conversations were inadmissible, since no objections were made to them, we think plaintiff could not complain of the testimony. The defendant in his testimony often gave his conclusions as "That is why I wrote the letter" "I told Massey Mrs. Potter was in distress" "I thought that was alright" "I took it for granted he would keep his word with me" "That was one of the conditions absolute and foremost in my mind." Objections to these statements were overruled. It is obvious that they should have been sustained. But we think the jury were not misled because the witness obviously was but giving his opinion. Again the witness stated "My God, would you want a woman to go on like that." Counsel for plaintiff said he thought this was improper. To which the court replied - "you brought it out three times". Counsel for plaintiff stated "I want to fix the time."

The record discloses that plaintiff had been over the subject a number of times and his statement that he wanted to fix the time would not have benefited him any.

We have considered the other rulings of the court to which counsel objected and while the ruling of the trial judge was not always accurate, yet we think that the issue as presented to the jury was not at all complicated and they

were not misled, because as stated, the only real controversy in the case was whether the agreement between the parties was that the guarantee was made by the defendant upon condition that plaintiff would cease dealing on account of Mrs. Potter after August 7, 1919.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

140 - 28792

NORTHWESTERN CONSOLIDATED MILLING COMPANY, a corp., Appellant, v. J. A. SLOAN, Appellee.	235 I.A. 619 APPEAL FROM CIRCUIT COURT, COOK COUNTY. Opinion filed Oct. 30, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant to recover damages alleged to have been sustained by it on account of the defendant's failure to accept 2,000 barrels of flour which he had purchased from plaintiff. There was a verdict and judgment in favor of the defendant and this appeal followed.

The record discloses that plaintiff was in the flour milling business in Minneapolis; that the defendant was engaged in the bakery business in Chicago and had from time to time purchased considerable quantities of flour from plaintiff and on the 11th of October, 1920, a contract was entered into between the parties whereby the plaintiff agreed to sell and the defendant to purchase 2,000 barrels of flour at $10.30 per barrel, the flour to be delivered within four months. The contract was in writing and provided that the "Buyer shall furnish shipping instructions to the seller not less than fifteen days prior to the time of shipment. If the buyer shall fail to file with the seller within fifteen days prior to the expiration of contract time

Opinion filed Oct. 20, 1914.

of shipment, shipping instructions permitting the seller to ship within the remaining period of contract time of shipment, then the seller may cancel this contract." On January 4, 1921, the defendant wrote plaintiff giving shipping instructions for 3,000 barrels of the flour. This was shipped by plaintiff to the defendant and paid for. The remaining 2,000 barrels of the flour was never delivered and plaintiff's position is that it requested shipping instructions from the defendant and that the latter refused to give them. On the other hand, the defendant's position is that he gave plaintiff shipping instructions for the 2,000 barrels, both orally and in writing, but that the plaintiff refused to ship the flour. The sole question between the parties, therefore, was as to whether the defendant had given the plaintiff shipping directions for the 2,000 barrels of flour. Plaintiff claimed that it was damaged in the sum of $2,000 by reason of the fact that the market price of the flour at the time it should have been delivered was one dollar less than that called for by the contract.

1. Plaintiff contends that the verdict of the jury, finding that the defendant had given plaintiff instructions on the 2,000 barrels of flour is against the manifest weight of the evidence. It appears from the evidence that the defendant had been buying flour from the plaintiff for sometime prior to the time it entered into the contract of October 11, 1920; that in July, 1920, he had purchased from plaintiff 5,000 barrels of flour at $13.50 per barrel; that no flour under the July contract was delivered, and that a dispute arose in regard to this contract. Plaintiff brought another suit against the defendant to recover damages, claim-

ing that the defendant had breached that contract. There was a trial of that case and a directed verdict for the plaintiff of $94,750.00. An appeal was taken from that judgment to this court, where we reversed the judgment. Northwestern Consolidated Milling Company against Sloan, No. 28083, not yet reported. On November 15, 1920, the defendant gave plaintiff two written orders for 2,000 barrels of flour to be delivered in four car load lots from the first to the twentieth of December. None of this flour was ever delivered, apparently for the reason that before the time for the delivery of this flour a dispute had arisen between the parties over the July contract. Witnesses for the plaintiff testified that this 2,000 barrels of flour was ordered by the defendant to apply on the July contract, while the witnesses for the defendant testified that this flour was to be delivered under the October contract; that the defendant had repudiated the July contract, claiming that he was not legally bound by it. On December 6, 1920, plaintiff wrote the defendant calling for shipping instructions on the October contract and upon receipt of this letter the next day, defendant advised the plaintiff that the instructions given on November 15th for 2,000 barrels of flour was on the October contract. Afterwards about the 15th or 16th of January, 1921, the defendant and his office manager, Louis Steinbach, with John S. Stone, who had charge of plaintiff's Chicago branch, went to Minneapolis to confer with a Mr. Gallagher, who was plaintiff's manager, and the testimony as to what took place at this meeting is conflicting. Stone testified on behalf of the plaintiff that the defendant refused to ac-

cept the remaining 3,000 barrels on the October contract unless plaintiff would release him from the July contract and write the defendant a letter apologizing for what had been done in reference to that contract and that plaintiff refused to do this. Defendant testified that at that time plaintiff was demanding further written instructions in reference to the shipment of the remaining 3,000 barrels; that he refused to give further shipping instructions, stating that such instructions had already been given on November 15, 1920, and further stated that he told plaintiff's representative that they would send the 3,000 barrels of flour at any time; that he did not demand as a condition, that plaintiff release him from the July contract or write the letter referred to.

There is other evidence in the record touching the question whether the defendant did give instructions for the shipment of the 3,000 barrels of flour, but we think it is unnecessary to discuss it further, for we are clearly of the opinion that the question was one to be determined by the jury, and after a careful consideration of all the evidence in the record, we are unable to say, sitting in this court, where we have but the printed record before us, that the finding of the jury on this question is against the manifest weight of the evidence.

3. Complaint is also made that the trial court erred in not admitting proper evidence on behalf of the plaintiff. The argument seems to be that on the trial of the case which involved the July contract and which took place before the trial of the instant case, the two written orders for flour

of November 15, 1920 were offered in evidence and, since plaintiff recovered in that case, that finding was res judicata that the shipping instructions of November 15th were on the July contract. Of course, this is unsound, because that case may have been decided on other evidence and on other issues and moreover the judgment rendered in that case has been reversed and the cause remanded for a new trial. Nor is the finding and judgment in this case res judicata that the orders of November 15, 1920, were for the shipment of flour under the October contract for the reason that in the instant case there was evidence tending to show that the defendant had orally ordered the 2,000 barrels and the court specifically instructed the jury that if they found such oral instructions had been given, they would be sufficient. Neither did the court err in refusing to admit in evidence the files of that case, it not being pointed out how they would be of any assistance to the jury in determining the question in the instant case.

3. Complaint is also made that the court gave erroneous instructions to the jury. An examination of the abstract and of the record shows the instructions given by the court, but it does not show at whose request they were given and unless the instructions complained of were given at the request of the defendant or by the court, which we are unable to say from the record, of course, the plaintiff could not complain. But, in any event, we think the instructions complained of were not prejudicial to the plaintiff. By one of these instructions, the jury were told that before the plaintiff could recover, it must prove by a preponderance of the evidence that

the contract was entered into between the parties; that the plaintiff was ready, able and willing to fulfill the contract on his part; that the defendant refused to carry out the contract, and that the plaintiff suffered damages. It is said this instruction was wrong because it was admitted that the contract was made and that the plaintiff was able and willing to perform its part of the contract. We think this argument is not warranted by the evidence, because if the defendant had given plaintiff instructions to ship the flour and it had failed and refused to do so, as the jury found and as the evidence tended to show, then plaintiff was not willing to fulfill its part of the contract. The next instruction complained of was to the effect that the written contract did not require that the shipping instructions given by the defendant be in writing, but told the jury that it would be sufficient if the defendant gave them orally. Paragraph 7 of the contract above quoted does not specifically require that the shipping instructions be in writing. It merely states that instructions shall be given to the seller not less than fifteen days prior to the time of shipment. It is then provided, that if the buyer shall not file instructions with the seller within the time required by the contract, the contract may be cancelled by the seller. We think there was no error in the instruction. The other instruction complained of, told the jury that the defendant had the right under the contract to give plaintiff shipping instructions at any time up to fifteen days prior to February 1, 1931, and that if they believed that defendant did give instructions and the plaintiff refused to deliver, plaintiff could not recover. And in this connection counsel argues "Our contention is that the

court in these instructions assumed facts that were not in evidence; that these instructions were misleading, erroneous and very prejudicial to the plaintiff in this suit." What facts were assumed that were not warranted by the evidence is not pointed out, nor is it pointed out where the instructions were contrary to the evidence. From what we have already said, we think it is clear that there was no error in giving the instructions. The evidence showed that there was a dispute as whether the defendant had ordered shipped the flour purchased under the October contract. Plaintiff taking the position that the flour had not been ordered shipped and the defendant a contrary position. The evidence, therefore, presented a question for the jury.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

158 - 28808

RAY CLAASSENS, Appellee, vs. SCHONIG MOTOR CORPORATION, a corp., Appellant.	235 I.A. 619 APPEAL FROM MUNICIPAL COURT OF CHICAGO. Opinion filed October 30, 1934.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages claimed to have been sustained by reason of defendant's negligence in caring for plaintiff's automobile, which was left in defendant's garage. There was a verdict and a judgment in plaintiff's favor for $101.02.

The record discloses that the defendant was conducting a public garage at No. 1937 E. 75th street, Chicago; that on the morning of February 14, 1933, plaintiff drove his automobile, which was a Reo coupe from Indiana Harbor to the defendant's garage where he desired to leave it for the day. The car was put in the garage about eight o'clock in the morning and when plaintiff called for it about four o'clock on the afternoon of the same day, he claims to have found it in a damaged condition; that afterwards he took the car from the garage and had it repaired, and brought suit against the defendant to recover the cost of the repairs.

Plaintiff testified that he bought the automobile in the year 1930, but whether it was new at that time does not

appear from the evidence; that he used the car on February 14, 1923, drove it from Indiana Harbor to the defendant's garage, and there is evidence, although it is somewhat feeble, to the effect that the car was running properly up to the time he left it at the garage. Plaintiff further testified that when he called in the afternoon, about four o'clock, the glass in one of the doors of the machine and the skid chains were broken; that they were not broken when he left the car in the garage in the morning; that he endeavored to start the car and discovered from the way the engine run, that something was wrong with it. He was unable to take it from the garage, because it would not run. Two or three days later the car was towed from the garage to a repair shop, where it was repaired. Plaintiff further testified that when he called to get the car and found it would not run, he told the defendant "that the center main bearing was burned out"; that he noticed at that time the choker was open; that he at that time talked with the President of the company and told him that he window was broken and the engine damaged.

The evidence further discloses that after the car was left in the garage on February 14th, the window was found to be broken and the defendant had one of his men take the car to South Chicago to obtain a new glass, but that the glass was not put in the door when the plaintiff called at four o'clock as they did not have time to do so. The President of the defendant company testified "we broke the glass and we will stand for it" and that he told this to the plaintiff.

A witness who did the repairs on the machine testified that upon examination, he found the "bearings burned and

window broken. That is all in particular." He further testified that he replaced the main bearings and repaired the engine in general; and that the radiator was also repaired.

It seems to be the position of plaintiff that the damage to the car, outside of the broken glass was occasioned by driving the machine with the choke open. The only evidence in the record to the effect that if a choke were left open, it would damage the car is from the testimony of the repairman who testified: "The lubrication shot under the main bearing from which it was stored. The pump sucks it. I examined the lubrication, it was rather thick and of a low grade. This is caused by using up too much gas and by improperly using the choker." Counsel for plaintiff then asked, "Q. Will the main bearing burn by pulling the choke half way out and letting the gas down. A. By using up too much oil." There is other evidence in the record, but since there must be a re-trial of the case, we think it would serve no purpose to discuss it further.

Complaint is made by the defendant that there was no proof tending to show that the car was in good condition when it was left at the garage. The difficulty with this is that when plaintiff sought to make such proof, objections of the defendant were sustained to it, and, of course, counsel for defendant cannot take advantage of any error that it is caused by his own action. When plaintiff was asked as to the condition of the car when he left it at the garage, an objection was sustained. The question might have been somewhat too broad, but in the absence of any examination having been made

of the machine by plaintiff prior to leaving it there, he ought to be permitted to show that he drove the car around and that it worked properly.

Complaint is also made of the giving of an instruction on behalf of the plaintiff to the effect that the defendant must prove that he exercised ordinary care of the automobile while it was in his garage, and that if the jury believed the plaintiff had proven by a preponderance of the evidence that the automobile was in good condition when delivered at the garage and was not in good condition when received by him, the burden of proof was on the defendant to show it exercised due care. Objection is made to the word "prove" in the instruction. There is no merit in this objection. This word has been repeatedly used in instructions, and the use of it has never been held error in this state. Moreover, in an instruction given on behalf of the defendant, the jury were told that the plaintiff was required "to establish his case" by a greater weight of the evidence before he could recover. Nor do we think there is any merit to the objection made to instruction No. 3, but we think the instruction should not have been given, because it told the jury that the measure of damages in case of a failure of a warehouseman for hire to deliver the automobil according to contract, is the damages to the automobile while in storage. There was no occasion of referring to a warehouseman at all. The issue was simple.

Complaint is also made that there was no "negligence charged and proven" and the argument seems to be that where a tort is relied on some acts of negligence must be alleged; that

plaintiff might have waived the tort and sued in assumpsit on the implied contract, but when he sued in tort, he must allege a tortious act. The argument is unsound when appealed to the case at bar. When plaintiff alleged that he delivered his automobile to the defendant in good condition and that when he received it, it was in bad condition, this made a prima facie case of negligence against the defendant. Nichols v. Union Stock Yards & Transit Co., 183 Ill. App. 14. Moreover, this was a fourth class case in the Municipal Court, where written pleadings are not required and it has been repeatedly held that the party suing need not even name his action, or if misnamed, that will not effect his rights, if upon hearing the evidence he appears to be entitled to recover and the court has jurisdiction of the defendant and of the subject-matter of the litigation. Edgerton v. C. H. I & P. Ry. Co., 240 Ill. 311; Dutmer Woolen Co. v. Transfer Co., 187 App. 406; McGlunn v. Gillespie, 227 Ill. App. 400.

We think the evidence is entirely insufficient to permit the judgment to stand. Plaintiff testified that he told the defendant's president that the window was broken and the engine damaged, while the evidence shows that the repairman replaced the main bearings and repaired the radiator, and the evidence fails to show that all the repairs made were occasioned by the negligence on the part of the defendant. We are not at all satisfied with the evidence, which is slight, that the driving of the car with the choke out would cause any of the damage complained of, the car only being at the garage for a few hours. On a retrial of the case, the condition the car was in when it was put in the garage should be brought out by

showing how old the car was, how far it had run and how it operated. Under the law, if the car was delivered in good condition to the defendant and returned in bad condition, and no explanation offered by the defendant as to what caused the car to be in the bad or damaged condition, the defendant would be liable for only such repairs as were occasioned by defendant's failure to properly take care of the car. And if the evidence discloses that the repairs were made by persons engaged in that business, then the amount charged by them is prima facie the reasonable cost of such repairs. Sears Roebuck & Co. v. Sears Olmyton Lumber Co., 328 Ill. App. 287; Cloyes v. Flentje, No. 32074, Appellate Court of Illinois, First District.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, J. CONCUR.

28819

165 - 28819

FOREMAN BROTHERS BANKING CO., Administrator of the Estate of Wlayslaw Chrzanzcz, Deceased,

Appellee,

v.

APEX MOTOR FUEL & LUBRICANT COMPANY, a corporation,

Appellant.

235 I.A. 619

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 30, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought this action under the Injuries Act to recover for the wrongful death of the deceased. There was a verdict and a judgment in plaintiff's favor for $750.00, and the defendant appeals.

The record discloses that the deceased, who was referred to in the record as Walter, was a boy about thirteen years of age; that a few minutes after noon of August 2, 1920, he was skating on roller skates north on the east sidewalk of Washtenaw avenue, between 26th street and 25th Place; that a truck belonging to the defendant was being driven west in the alley between these two streets and as it was crossing the sidewalk Walter skated into the side of it, and the rear left hand wheel ran over him, injuring him so that he died shortly thereafter. He left surviving him his mother, who was a widow, John nineteen years of age, Soler ten years of age, and Andrew six years of age, his brothers, Stella twenty-one years of age and Stasia thirteen years of age, his sisters,

his only heirs at law and next of kin.

The defendant contends that the evidence discloses that the deceased was guilty of negligence and that the defendant was not and there should have been adirected verdict for the defendant at the close of all the evidence as requested. The evidence discloses that Walter was about thirteen years of age at the time he was injured; that he had been skating on roller skates for about two years before that time; that he lived in the neighborhood where he was injured; that 26th street is an east and west street and is intersected at right angles by Washtenaw avenue; that the first street north of 26th street is 25th Place; that about midway between those two streets is an alley which extends east from Washtenaw Avenue, but not west; that on the northeast corner of Washtenaw Avenue and 26th street a store building was located and immediately east of the store a residence occupied by the witness Jan Jerz; that immediately south of the alley and on the east side of Washtenaw there were some sheds, extending some distance along the alley and Washtenaw avenue; that between these sheds and the corner store was a fence; that there was a cement sidewalk about six feet in width along the east side of Washtenaw avenue.

Jan Jerz, testified for the plaintiff that at thetime of the accident he was chopping wood in his back yard; that he heard some one "holler"; that he left his work and went west to Washtenaw avenue through a gate in the fence to see what occurred and saw Walter lying in the alley, his head to the south and his feet to the north; that the truck was standing still

on the west side of Washtenaw avenue; that when he was chopping wood in his back yard he did not notice the truck pass west through the alley and did not hear any horn or other signal.

Rudolph Adamczyk for the plaintiff testified that he lived at number 3651 West 24th Place; that just before the accident he was running north on the east side walk of Washtenaw avenue and passed Walter who was skating; that he stopped at the alley and after he crossed the alley he passed two girls going in the opposite direction going north on the sidewalk; that after he had gone a short distance he heard somebody scream and turned around and saw the rear wheel pass over Walter; that when he crossed the alley he did not hear any horn sounded on the truck; that after Walter was injured, the truck went about fifty feet and stopped on the west side of Washtenaw avenue; that north of the alley to 25th Place on the east side of Washtenaw was vacant; that at the time he was in a hurry to get home to his dinner; that he testified at the inquest and at that time was asked whether he had heard a horn on the truck and answered that he did not pay any attention to the horn. On the trial he explained this, testifying to the effect that he meant to say at the inquest that the horn was not sounded. This was all the evidence offered on behalf of the plaintiff.

For the defendant, Andrew N. Johnson testified that he was a licensed chauffeur and drove the truck in question; that the truck when empty weighed more than 10,000 pounds; that he had been delivering fuel in the alley three or four

doors east of Washtenaw avenue and after making the delivery started west in the alley at a rate of five or six miles per hour; that the alley was not paved; that there was quite an incline as he left the alley to pass on to the sidewalk, and that when he passed over the sidewalk he was going about three or four miles per hour; that he did not see the boy Walter until he heard the scream and looked around and saw Walter raise his hands so as to prevent his being run over by the truck; that Walter hit the side of the truck and the rear wheel passed over him; that he stopped within ten feet afterwards, and because his truck was obstructing the traffic he then drove it to the west side of the street. He further testified that as he was coming out of the alley he saw three girls walking south on the west sidewalk of the street and that he sounded his horn several times before crossing the sidewalk.

Evelyn F. Viinicky, May Pelc and Anna Gately, three young women who were employed in the vicinity, a short distance north of the place of the accident; one of them being a dictaphone operator and the other two stenographers, each gave testimony to the effect that they were walking south on the east sidewalk of Washtenaw avenue, north of the alley; that they saw the truck going west in the alley; that when it was some distance from the sidewalk, there being no buildings between the alley and 25th Place on the north, the driver sounded his horn a number of times as it proceeded west; that they passed in front of the truck, and when they were approximately twenty feet from the alley on the sidewalk they met Walter who was skating north on the sidewalk;

that one of the girls held out her hand in an endeavor to stop Walter on account of the truck coming out of the alley, but that he passed by them and almost immediately they heard a scream and looking around saw him strike the side of the truck and fall under it and the rear wheel pass over him.

The defendant contends that it appears from the evidence that the driver of the truck was not guilty of negligence and that Walter was. Plaintiff replies that whether the defendant was guilty of negligence and the deceased in the exercise of ordinary care for his own safety, are questions of fact for the jury, and it is said that Johnson, the driver of the truck was negligent "in that he did not keep a particular watch for any one coming out from behind these buildings" which buildings extend to the shed at the corner of thealley and street. And it is argued in this connection that if Johnson had been driving the truck at the low rate of speed which he testified to, he could have stopped the truck almost instantly, and as this was not done, it tends to show that the truck was going faster than Johnson testified.

In such cases as this, the question of negligence is usually one of fact for the jury, but where all reasonable minds would reach the same conclusion, then the question is one of law for the court. Upon a careful consideration of all the evidence, we are clearly of the opinion that the evidence fails to disclose any negligence on the part of the driver of the truck. Therefore, the court should have directed a verdict in favor of the defendant. The question

was one of law and not of fact. It is also apparent that the jury did not consider the defendant liable, because they fixed the damages at such a small sum. If the defendant was liable in this case no judgment ought to stand unless it was for several thousand dollars.

There being no evidence of negligence on the part of the defendant the court should have directed a verdict at the close of all the evidence as the defendant requested. In these circumstances, it is our duty to reverse the judgment with a finding of fact. Wirich v. Forschner Contracting Co., 313 Ill.343.

The judgment of the Circuit Court of Cook County is, therefore, reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the defendant was not guilty of the negligence charged.

THOMSON, J. AND TAYLOR, J. CONCUR.

138 - 28855

SAM NOSEN,

Appellee,

v.

J. BASKIN and SAM MOSHKOVITZ,
On appeal of J. BASKIN,

Appellant.

235 I.A. 620

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 30, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On June 28, 1923, judgment by confession was entered in favor of plaintiff against the defendants for $780.00, $680.00 of which was for rent under a written lease for the months of November and December, 1922, and January, February, March, April, May and June 1923, and $100.00 attorney's fees. The defendant Baskin moved the court to open up the judgment and for leave to defend and, in support of the motion, filed his affidavit. The court denied the motion on August 8th and on August 16th following, Baskin made another motion to vacate the order of August 8th and to open up the judgment and for leave to defend and in support of this motion he submitted his affidavit, which motion the court denied and this appeal followed.

The defendant in his affidavit in support of the motion made on August 16th, set up that the judgment of $780.00 rendered against him was based on a lease of a store located at No. 5207 Broadway whereby plaintiff demised the store to the defendant for the purpose of conducting a butcher

shop; that defendant, on June 1st took possession of the premises under the lease, and conducted a butcher shop in the store. The affidavit further sets up that the building in which the store was located, was a two story building, and that plaintiff retained dominion and control over the second floor which he rented to another person; that plaintiff agreed to keep the roof of the building in a good state of repair; that he failed to do so, but, on the contrary, permitted it to be in a bad state of repair, so that the rain many times leaked through into the store which rendered it impossible for the defendant to conduct his business; that on account of the rain coming through the roof, the plaster of the ceiling of the store fell down; that defendant was notified of the fact that water leaked through the roof and that he promised to repair same, but negligently failed to do so; in consequence further leakage occurred; that as a result defendant was unable to conduct his butcher shop, but was compelled to leave the premises on September 1, 1923; that the rental claimed by plaintiff in his statement of claim was for months subsequent to the time plaintiff was compelled to leave the premises. The affidavit further set up that included in the judgment rendered against him was rent for the months of May and June, 1923, although another tenant of plaintiff's occupied the building during these two months.

It is further alleged in the affidavit that plaintiff obtained another judgment by confession against the defendants in the Municipal Court for the months of September and October, 1922; that that judgment was entered on October 5, 1923, and upon motion of the defendants it was opened up

and the court gave them leave to defend, and that that cause was still pending.

Although the lease provided that the tenant should keep the demised premises in good repair, and further provided that the landlord should not be liable for any damage or injury caused to the tenant's property, which damage was occasioned by water coming through the roof, yet under the law, the tenant was not required to keep the roof in good condition, but was only required to keep his particular store in repair. It was the duty of the landlord, since he rented the upper floor to another, to keep the roof in good repair. And in case he knowingly failed to do so after reasonable notice and the premises were rendered untenantable, he would be guilty of constructive eviction, and if the tenant moved out of the premises under these circumstances, he would not be liable for rent after doing so. Both parties concede that this is the law, but plaintiff contends that the affidavit was insufficient to warrant the court in opening up the judgment, because it failed to aver necessary and essential facts, in that nowhere was there set up in the affidavit the date or dates when the leakage occurred; nor the date or dates when notice was given to the landlord that the roof was leaking; nor the date on which the defendant quit the premises. A further contention is made by the plaintiff that the affidavit is insufficient in respect to the months of May and June, 1925, in that it does not aver that plaintiff received any rent for those two months.

When a motion is made to vacate a judgment entered

by confession, the affidavit filed in support of the motion are to be construed most strongly against the moving party. It is not sufficient to state facts from which, if proved on a trial, a defense might be inferred. Chicago Fireproof Co. v. Park National Bank, 145 Ill. 481. "There can only be a constructive eviction where the premises leased are rendered useless to the tenant, or the tenant is deprived in whole or in part of the possession or enjoyment of them, as a result of the willful and wrongful act of the landlord, which act may be the willful omission of a duty, or the positive commission of a wrongful act." Gibbons v. Mosfield, 299 Ill. 455.

In the instant case plaintiff having leased to the defendants the store on the first floor of the building and the upper floor to another tenant, plaintiff was required to keep the roof of the building in repair. Bissell v. Lloyd, 100 Ill. 314. Under the law as applied to the facts in the case at bar, before the landlord could be held to have constructively evicted the tenants by reason of his failure to repair the roof of the demised premises, it must appear that the landlord knew that the roof was leaking; that he had a reasonable time to repair it and failed to do so. The record discloses that the tenant took possession of the premises June 1st and vacated them on the first of September following. The affidavit in support of the motion to vacate, does not state when the tenants notified the landlord that the roof was leaking; nor when the landlord agreed to repair it. We are, therefore, unable to say from the record when the landlord was notified that the roof leaked,

or that he was given ample time within which to repair it and that he refused to do so. For aught that appears the notice to him might have been given at such a short time prior to September 1st that he did not have sufficient time to make the necessary repairs. In these circumstances, it could not be said that the landlord was guilty of constructively evicting his tenants.

Nor is there sufficient in the affidavit to show that the landlord had obtained rent for the store for the months of May and June, 1913, because there is no averment in the affidavit that plaintiff received any rent for those months. Construing the affidavit most strongly against the defendant, as under the law we must, sufficient facts were not set up to warrant the court in opening up the judgment.

There is nothing in the case of Aaron v. Osborne, 213 Ill. App. 588 to warrant defendant's contention that the affidavit in the instant case was sufficient. In the Aaron case what facts were set up in the affidavit tending to show negligence of the landlord do not appear.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

28867

310 - 28867

MRS. C. ROKES, Appellee, v. TWELFTH STREET STATE BANK, Appellant.	235 I.A. 620 APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Oct. 30, '24.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant to recover $875.00, which was deposited in the savings department of defendant's bank, and after allowing defendant $350.00, which was due it from plaintiff on her promissory note, there was a verdict and a judgment in her favor for the balance $439.50 and the defendant appeals.

It appears from the record that plaintiff opened a savings account with the defendant on August 17, 1919, and thereafter made deposits from time to time and on November 28, 1919 she drew out what she then had in the bank $310.00. Afterwards on July 10, 1920, plaintiff made another deposit in defendant's bank of $100.00 and from time to time thereafter made other deposits and on December 13, 1920, the amount then remaining in the bank was $875.00.

It is defendant's contention that when the account was opened the second time, it was the joint account of plaintiff and her husband, while the position of the plaintiff is that the account was made by her individually and that her

husband had no interest in it.

The evidence further shows that on or about December 14, 1930, defendant was served with a garnishee summons issued by the Clerk of the Circuit Court of Cook County in a garnishment proceeding then pending in that court, wherein plaintiff and her husband for the use of one Anton Dubek were plaintiffs and the defendant, the Twelfth Street State Bank, was defendant. It further appears that the judgment upon which the garnishment suit was brought was rendered before a Justice of the Peace wherein Anton Dubek was plaintiff and plaintiff and her husband were defendants.

On January 15, 1931, which was shortly after defendant was served with process in the garnishment proceedings, plaintiff and her husband called upon the bank to withdraw from the savings account $260.00. They were then informed by the cashier of the bank that the account had been garnished in the Circuit Court proceeding, and therefore, defendant was not able to permit the withdrawal of the $260.00. The cashier told plaintiff and her husband that they had better see their lawyer, which they agreed to do, and afterwards they did see their attorney in reference to thegarnishment matter, but what they said or did in this respect does not appear. The cashier further told them at that time that while no money could be withdrawn from the savings accounts, he would loan them the $260.00, providing they would sign a note for that amount, and this was done. They executed a note dated January 15, 1931, and due three months after date. The note was an ordinary collateral note and by it, plaintiff and her husband assigned to the defendant the "sav. acct. book" as collateral

security for the $250.00 and "for every other indebtedness, whether direct, indirect, absolute, contingent, joint or several, and whether now owing or due, or which may hereafter from time to time be owing or due, howsoever, and whether now or hereafter contracted or created." The record further discloses that on the second of February, 1931 following, judgment was entered by the Circuit Court of Cook County in the garnishment proceedings against the defendant bank for $432.50, together with $12.65 costs; that on March 12, 1931, the garnisheed bank paid this judgment, and a satisfaction piece was filed in the clerk's office of the Circuit Court of Cook County. Afterwards plaintiff demanded the $675.00, which had been deposited in the savings account, but the defendant refusing, she brought this suit.

To the declaration defendant among other pleas, filed a special one which set up, that at the time it was served in the garnishment proceedings, plaintiff and her husband had a joint account in the defendant bank; that afterwards judgment was entered against it in that proceeding and it was compelled to pay the judgment. The defendant filed a further special plea, setting up that plaintiff was indebted to the defendant on the promissory note executed by herself and her husband in the sum of $250.00, which was still due and unpaid. To these pleas plaintiff replied that the judgment rendered against her and her husband, which was the basis for the garnishment suit, was a joint judgment against herself and her husband, while the deposit in the savings bank was her individual account, and therefor the bank was not authorized to satisfy the judgment rendered in the garnishment proceedings out of the money on deposit.

By a further replication, plaintiff admitted her indebtedness of the $350.00.

There is no dispute in the evidence as disclosed by the record which we have above set forth. The only dispute on the trial was as to what took place at the time the account was opened with the bank on July 10, 1920. At that time the evidence discloses that when plaintiff and her husband went to the bank to make the deposit, the old card which had been signed by Mrs. Kokes, plaintiff, when she opened her account on August 7, 1919, was produced by the cashier and that in their presence he made a notation on it "joint acct. July 20th." Mrs. Kokes' name appeared on that card from the time she opened up the first account and her husband signed it on July 20th. Plaintiff testified that at that time "the cashier told my husband that he could not draw $5.00". Joseph Kokes, plaintiff's husband testified that at that time "he did not want to sign the card at first, but the cashier said that he could not get $5.00; that that was on account of death." The cashier of the bank testified that plaintiff and her husband came to the bank and said "we want to start our account again"; that he then produced a card on which he made the notation, which was then signed by defendant's husband; that neither plaintiff or her husband made any objection when the card was made out and signed by the husband. In rebuttal he testified that he did not tell plaintiff or her husband at that time that the latter could not draw out even $5.00 of that money; that he did not say that the husband could only draw out the money in case of plaintiff's death.

No complaint is made of the ruling of the court

in the admission or exclusion of evidence; nor to the giving or refusing of instructions, although the court unduly limited the defendant when he refused to permit the cashier to testify, as to what plaintiff's husband said at the time the account was opened.

Defendant contends that the finding of the jury to the effect that the evidence discloses that the account opened in July, 1930, was the individual account of plaintiff and not the joint account of plaintiff and her husband is against the manifest weight of the evidence. We think this contention must be sustained and this, too, although the undisputed evidence is that all of the money deposited belonged to the plaintiff, because plaintiff's explanation as to why the deposit card was marked as the joint account of herself and her husband by defendant's cashier at the time the account was opened and at the time it was signed, that they were informed by the cashier that this was required so that plaintiff's husband would withdraw the money in case of her death, is difficult to understand. The evidence shows that the cashier had acted in that capacity for four years, and prior to that time he was in the real estate business, and had been a Justice of the Peace. And it seems inconceivable that he would advise them that the notations made on the card would permit plaintiff's husband to withdraw the money after her death. But it seems clear that the reason the card was marked as the joint account of both plaintiff and her husband, and plaintiff required to sign it at that time, was because the account was in fact

a joint account, and that the finding of the jury to the contrary is clearly against the manifest weight of the evidence.

We are further of the opinion that plaintiff was not entitled to recover as a matter of law, and the court should have instructed the jury to that effect as requested by the defendant, even if we assume the law to be as both counsel agree, viz. that an individual account is not subject to garnishment, where the judgment on which it is based is against plaintiff and another, Siegel, Cooper & Co. v. Schwock, 167 Ill. 523, for the reason that defendant was compelled to pay the judgment rendered by the Circuit Court of Cook County in the garnishment proceedings. The defendant did not volunteer to pay this, but was compelled to do so, and it certainly would be a great injustice to require the defendant bank, which was compelled by a judicial proceeding to pay a large sum of money for the benefit of plaintiff and then to permit her to recover the same amount in another proceeding. Minard v. Lawler, 86 Ill. 302. Plaintiff was notified by the defendant of the garnishment proceeding in ample time for her to intervene in that case, but she did not do so, but permitted the judgment to go against the bank and afterwards it was compelled to pay that judgment. She ought not now be permitted to say that the amount of the judgment was erroneously paid by the defendant.

Moreover, we think there is another reason why plaintiff cannot recover here. When she borrowed $250.00 from the bank January 15, 1931, she and her husband pledged the savings account as security for the $250.00 and for any

other indebtedness which she or her husband jointly or severally might become liable for, whether the liability was absolute or contingent. Under the circumstances as disclosed by the evidence, we think that when defendant paid the judgment rendered against it in thegarnishment proceedings, that it might then under the terms of the collateral note, apply the deposit, even if it be considered plaintiff's individual deposit, in satisfaction of such payment. We do not pass on the question whether the garnishment proceedings, which was an oral action in the Circuit Court, would lie on the judgment rendered by a Justice of the Peace, (Hughes v. Ft. Dearborn Natl. Bank, 47 Ill. App. 567) because the point has not been made.

Since plaintiff cannot recover in this case, the judgment of the Superior Court of Cook County will be reversed, but the cause will not be remanded.

JUDGMENT REVERSED.

THOMSON, J. AND TAYLOR, J. CONCUR.

235 - 26693

235 I.A. 620

THE SCHILLINGER CONSTRUCTION COMPANY,
Appellee,

v.

MIDWESTERN COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct.30, '24.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover $1363.61, claimed to be due it for (1) money which it had paid the defendant for rental of a machine; (2) time and money expended in endeavoring to put it in condition so that the machine would operate; and, (3) damages sustained by plaintiff on account of the failure of the machine to work. The first two items were allowed by the court and the third item was disallowed. There was a finding and a judgment in plaintiff's favor for $852.61 and the defendant appeals.

The record discloses that plaintiff and defendant on the 27th of May, 1920, entered into a written agreement, which provided that the defendant was to furnish plaintiff a "Smith Hot Mixer" steam driven machine which was to be loaded "in good working condition" at Rock River, Illinois and shipped to plaintiff at Chicago. The contract further provided that upon plaintiff receiving the machine, it should have an option of sixty days within which time it might purchase the machine for $1500.00; that upon receipt of the machine by

plaintiff, it was required to pay $50 .00 as rental, together with freight charges and in case plaintiff exercised its option, the $500.00 was to apply on the purchase price. The defendant shipped the machine to plaintiff at Chicago and upon its arrival, a superficial examination was made of it. Plaintiff then paid $500.00 and took the machine. Upon a close examination of the machine, certain parts were found to be missing, some of these were furnished by the defendant. The machine would not do the work that was expected of it, but it was found to be old and worn out, and of little or no value. Engineers were put to work on the machine in an endeavor to put it in working condition. Both parties endeavoring to put the machine in good working condition and the evidence discloses that a representative of thedefendant, who examined the machine, told plaintiff to go ahead and fix up the machine, and the defendant would pay the expense. The machine would not do the work that was expected of it and it was returned to the defendant. Plaintiff expended in its endeavor to repair the machine more than $300.00, and it is to recover this as well as the $500.00 which plaintiff had paid defendant upon receipt of the machine, that this suit is brought.

There is little or no dispute in the evidence and the facts above set forth are clearly established.

The defendant contends that plaintiff failed to prove his claim by a preponderance of the evidence. There is certainly no merit in this contention. A further contention is made by the defendant that as stated by his counsel "In contracting for the purchase of a specific article under its patent or trade name, there is no implied contract as to its

fitness for any particular purpose." This proposition of law has no application to the case before us here, there was an expressed written contract which provided that the machine was to be in good working condition.

The liability in this case is clear and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

244 - 29333

JACOB J. FELS, ET AL,
Appellees,

v.

J. A. HIDDERMAN,
Appellant.

235 I.A. 620

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 30, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought an action of forcible detainer against the defendant to recover possession of certain premises occupied by him. There was a trial before the court without a jury and there was a finding and judgment in plaintiff's favor, to reverse which the defendant prosecutes this appeal.

The record discloses that plaintiffs were owners of an apartment building in Chicago and that one of the apartments was occupied by the defendant under a written lease expiring September 30, 1923. The rental was $125.00 per month. On the first of October, 1923, the present suit was instituted. The controversy on the trial was as to whether plaintiffs had orally agreed that the defendant might continue to occupy the apartment from October1, 1923, until April 30, 1924, at the same rental; the defendant to do any cleaning that he might desire at his own expense. The defendant's wife and her chauffeur gave testimony tending to show that such oral agreement had been made. Evidence offered on behalf of the plain-

tiffs was to the effect that no such agreement had been made, but that when the defendant's wife spoke to plaintiff Jacob J. Fels, the latter part of August, 1923, concerning the matter, he referred her to his agent who had charge of the apartment. There was a direct conflict on this point, and the court expressly stated that he believed the plaintiff's version of the matter. In these circumstances, we would not be warranted in disturbing the finding of the trial court, unless it was clearly and manifestly against the weight of the evidence. We have carefully examined all of the evidence in the record and are unable to say that the finding of the trial judge is against the manifest weight of the evidence, and, therefore, under the law, we are not warranted in disturbing the judgment.

But in this court counsel for the defendant contends that the court erred in refusing the defendant's offer to prove that at the time the suit was begun, plaintiffs had rented the property to another person and counsel also makes some further argument to the effect that the lease which was offered in evidence shows that the landlord was Max N. Block and not the plaintiffs, and that the lease was not assigned by Block to plaintiffs. Neither of these contentions was brought to the attention of the trial judge and it is elementary that a contention cannot be made for the first time in this court. No mention was made of the fact on the trial that the lease had not been assigned to plaintiffs by Block, and the only thing in the record that touches the question whether plaintiffs had rented the apartment to other parties appears in the cross-examination by counsel for the defendant of plaintiff Jacob Fels, which is as follows: "Q. Did you

rest this flat to anybody else (Counsel for plaintiffs) Object. Witness excused." There was no ruling of the trial judge and the question was in effect withdrawn.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

68 - 28718

SHERIDAN REALTY COMPANY, a corporation, Appellee, v. DAVID BROWN, Appellant.	235 I.A. 620 APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Suit was brought by the plaintiff, Sheridan Realty Company, a corporation engaged in the real estate business, against the defendant, David Brown, for a real estate commission, which it is claimed pon behalf of that company was due it for procuring for the defendant a tenant for certain premises in Chicago. The cause was tried before the trial judge, without a jury, and a judgment entered in favor of the plaintiff in the sum of $600 and costs. This appeal is therefrom.

The statement of claim of the plaintiff contained the following:

> "That on or about the 11th day of January, A. D. 1922, the defendant requested the plaintiff to procure for him, the said defendant, a tenant for the property of the defendant, situated at 4724-26 Kenmore avenue, Chicago, Cook County, Illinois, for a period of six years at an annual rental of $8,000.00, and that thereafter the plaintiff procured for the defendant a responsible tenant for said premises, who was ready, able and willing to lease the said premises upon the terms proposed by the defendant, but thereupon, the defendant refused to enter into said proposed lease, by reason of which, the defendant has become liable to pay to the plaintiff the reasonable and customary value

Opinion filed Oct. 30, 1934.

of the services of the plaintiff in so procuring said tenant, amounting to the sum of $660.00."

The defendant filed an affidavit of merits, in which it was alleged that the plaintiff "did not at any time, secure, produce, or tender to the defendant a responsible tenant, who was ready, willing and able to lease the premises of the defendant at 4724-26 Kenmore Ave., Chicago, upon the terms demanded by the defendant," and that the sum of $660.00 was not the reasonable value of the services rendered by the plaintiff.

The theory on behalf of the plaintiff is that it produced a Mrs. Clara Daube as a tenant who was ready, able and willing to rent the premises in question, at a rental of $6,000 a year.

On the other hand, it is the theory on behalf of the defendant that the evidence failed to show that Mrs. Daube was at any time ready or willing to take a lease under the terms provided for.

It was admitted in the course of the examination of the defendant, at the trial, that the plaintiff was employed by the defendant, and that the terms of the employment were as set out in the plaintiff's statement of claim. The only issue remaining, therefore, was whether the plaintiff procured a tenant pursuant to the terms of its employment.

The plaintiff called five witnesses: Blumenthal, Dike, Kersey and Schlechter, all of whom were employed by the plaintiff, and Mrs. Blumenthal, who testified to a telephone conversation. The evidence of the defendant consisted

of the services of the plaintiff in my remaining
about himself, something he was a [illegible].

The defendant tried to [illegible] of action, in that
it was alleged that the plaintiff had not [illegible] now
[illegible], as known to the defendant's reasonable [illegible],
who was ready, willing and able to [illegible] the services of the
defendant as [illegible] [illegible], [illegible] that the [illegible]
[illegible] by the defendant, [illegible] [illegible] of [illegible]
was not the paramount aim of [illegible] [illegible] by
the plaintiff.

The theory on behalf of the plaintiff is that he
produced a [illegible] [illegible] who was young,
[illegible] and willing to [illegible] the [illegible] [illegible] is a
[illegible] of [illegible] a [illegible].

On the other hand, it is the theory on behalf
of the defendant that the evidence fails to show that
[illegible] was at any time [illegible] or willing to [illegible] a
[illegible] under the [illegible] [illegible].

I was [illegible] on the [illegible] of the [illegible]
of the defendant, as the [illegible], that the plaintiff was [illegible]
[illegible] by the defendant, and that the terms of his [illegible]
[illegible] were as [illegible] on the plaintiff's [illegible] of [illegible].
The [illegible] [illegible], [illegible], the [illegible] the [illegible]
[illegible] proceeded [illegible] [illegible] on the [illegible] of the [illegible]
[illegible].

The plaintiff [illegible] [illegible] [illegible], [illegible],
[illegible], [illegible] and [illegible], [illegible] [illegible] [illegible] [illegible]
the [illegible], [illegible] [illegible]. [illegible], [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible]. The [illegible] of the [illegible] [illegible]

of his own testimony and that of Mrs. Daube. The evidence of Schlechter is that Mrs. Daube, on January 17 or 18, 1923, stated that she was willing to sign a lease on the terms mentioned, but that she would not pay any part of the commission which Mr. Brown wanter her to pay. The evidence of Dike is that Blumenthal had secured the tenant, so he, Dike, took up the matter with Mrs. Daube; that the defendant came in and said he would not pay the commission; that if the plaintiff would get an agreement from Mrs. Daube to pay the commissions he would enter into a lease; that Mrs. Daube, on January 22 or 23, and in the first or second week of February, stated that she was willing and had been willing to take the building, but she did not know then whether she was willing or not; that the defendant was trying to lease her another building; that he, Dike, drew up a lease and told him, the defendant, the lease was ready for him and Mrs. Daube to sign; that the defendant said, "I will not pay a commission unless Mrs. Daube pays a commission, and it won't go through, and another thing, my wife does not want to lease this flat building until after we have something else." Dike further said that the lease, although drawn up, was not presented because the defendant refused to pay a commission.

The evidence of Blumenthal is that he introduced Mrs. Daube to the defendant on January 16, 1923; that after some negotiations, the defendant consented to lease the property for six years; that the defendant said that a $3,000 deposit, instead of cash, would be satisfactory. Blumenthal testified that he then told the defendant that he and Mrs. Daube would call again the first of the week, and that Mrs.

of his own twenty-one dollars of her money. The evidence of indebtedness is that from Burke, or Bunsby if so is, Lucy, stated that she was willing to give a lease on the house mentioned, but that she would not pay any part of the remaining eight.. Green number two is pro. The evidence of Clem is that Plumwhist had assumed the lease, so he, Clem, took up the matter with Ike. Bunsby that the difference was in not wanting to pay the commissions since it the plaintiff would get no expense from them. Bunsby is not the commission to which owner into a lease; that Ike, Clem, in January 20 or 22, met in the line up among week of February, stated that she was willing and had been willing to give the building, but she did not know when whether she was willing or not; that the matter was trying to lease her another building that he, Clem, done so a lease and sale also. Ike is lessee, the lease was ready for his and Lucy. Bunsby to sign; that the defendant said, "I will not pay a commission unless you make page a commission, and it wasn't go through, and another thing, my wife does not want to lease this building unless it after we have something else." Bunsby further said that the house, although drawn up, did not represent Lucy and the defendant refused to pay a commission.

The evidence of Plumwhist is also to interest. Cy, being in the defendant on January 18, Bunsby then other room negotiations, the defendant mentioned to lease the property for six years; that the property sold for $75,000 dispute, instead of week, would be satisfactory. Plumwhist testified that he then said the commission then is not 20%, Jones would call upon the floor of the week, and that

Daube said she would talk to him then more about it. Blumenthal stated that the defendant on January 16 said he would lease the building and take care of taxes and insurance and leave the interior to Mrs. Daube to take care of. Blumenthal said further that Mrs. Daube stated that she would let him know in a few days, and that he and the defendant went over to the plaintiff's office and discussed the matter; that several days later he went to see the defendant, and was told by him that his wife did not want to give up the building until they had another three flat building. Blumenthal says further that then he said to the defendant, "We have done our share of the work - Mrs. Daube is the tenant; she is willing to go ahead and take the building. Now you don't want to go ahead with it." A week or ten days later, according to Blumenthal, he went to see the defendant and found him still in the same frame of mind; on that occasion the defendant asked him to try and switch her over to another building of his. On cross-examination Blumenthal testified that after a certain telephone conversation with the defendant, he went over to see him and told him that Mrs. Daube was ready and willing to go through with the deal, to which the defendant answered, "My wife won't let me go through with it." "I can't help it, you can sue all you want to. My wife don't want to move and that is all there is to it."

The evidence of Kersey is that the defendant called at the plaintiff's office about January 27; that at that time the lease with Mrs. Daube, as lessee, was already drawn up; that on that occasion the defendant said that his wife

Burke said she would only be in the town some short time. Plaintiff stated that the difficulty in Jasper is said he could blame the building and loan more of house and lose property and leave the township for ever. Burke is a man over 21. Plaintiff well forbade that. Burke stated that she would let him know in a few days, and that he and defendant went over to the plaintiff's office and discussed the matter. Then returned here [illegible] to see the defendant, and. she said he was sick his wife did not want he give up the building until they had another place. Plaintiff. Plaintiff not further will time is said to the defendant, "he have the chance of the rent - Burke is the tenant; she is willing to go along and take the building. For you don't want to go about with it."

A week or the days later, according to plaintiff, he went to see the defendant and found his wife in the same frame of mind as that occasion. The defendant asked him to say and with her ever a certain building if she. In cross-examination Plaintiff testified that after a certain Saturday conversation with the defendant, he took over to see his and told him that Mrs. Burke was ready and willing to go through with the deal, to which the defendant answered, "My wife won't let me go through with it." "I would help it, you can use all you have for. My wife don't want to move and that is all there is to it."

The evidence of Lowry is that the defendant said to the plaintiff's wife when Lowry [illegible] "Pat is that line all lines with Burke, Burke is [illegible]." The witness Lowry said he that conversation the defendant said that his wife

would not sign it unless he got another flat, and made a proposition that the plaintiff undertake to lease another building, a twelve flat building belonging to the defendant, instead of the one in question.

According to the defendant's testimony, on the first occasion Mrs. Daube merely said that she liked the building, but would have to write to her son in Minneapolis and get his advice first; that when she visited the premises the second time she said she wanted to think it over a while and that he, the defendant, would hear from her within a short time. As to the telephone conversation with Dike on or about January 18 or 20, the defendant says that he told him that he wanted to talk the matter over with his attorney and with his wife. Further, he says, that subsequently he did tell Dike to try to get a commission from Mrs. Daube, or half of it if he could, and asked Dike to call up Mrs. Daube when he was ready to give her a lease, to get in communication with her and straighten the matter out; that he told Dike his wife objected to moving out of the building unless she had another place to live in. The evidence is, further, that later when he talked with Blumenthal, he said he would like to have Mrs. Daube for a tenant, but that he had no definite proposition from her; that whenever she came in she never said she wanted the building, but always said she was not in a hurry for it, that she had ample time, but there was no "rush" about it; that he called her up the succeeding Thursday and told her if she wanted the building she had better come over and get it, because he had to give the tenants sixty days notice; that she did

come the following Saturday night and said she had reconsidered the matter, having written to her son and been advised against it. He further testified that after he had been informed by the plaintiff's attorney that if he did not pay the commission he would be sued, he told Kersey that he had offered the building to Mrs. Daube, but that she refused to take it; that he was still willing to let her have it.

It is difficult to conclude from the testimony of Mrs. Daube whether she ever made up her mind to rent the property. Her evidence is that when asked for a deposit by Blumenthal she stated she was not ready, did not positively know whether she wanted it or not and hadn't made up her mind, and when asked if she had ever decided on the lease she answered, "Never." As to the testimony of Dike, Blumenthal, Schlochter and Kersey, as to whether she was ready and willing to take the lease, she answered in a vacillating way, which evidently meant that she had not actually stated to any one of them that she promised to take the premises.

A close examination of the testimony of Dike, Kersey, Schlochter and Blumenthal fails sufficiently definitely to show that Mrs. Daube was at any time ready and willing to rent the premises in question, at an annual rental of $6,000. It is true that the testimony of Dike is, that he drew up a lease and called up the defendant and asked him to come over to the plaintiff's office, and that the lease was ready for him and Mrs. Daube to sign; and that he make arrangements to have

some the following summary of his own pain and his prescription. Having written it in one sit, it was without equivoc is. In further instalments this article is to have influence on the principle attorney will be in the one by the consideration to which he is good, so that forney that he had achieved the beginning to one, sound, and this the evidence in some thy show. Lawyers will nothing to lie her than is.

It is difficult to separate from the lawyers of Ohio. Under whatever one may wish to say what to stay the company. The answer is any over issue by a law point by dismissal, the studies the see the truth. It has practically been clarify the studies it to not the cause's mind to his mind, and then stand if the law ever pleasure as the lawyer the answer, "Sound." to the discussing of this. Dismissal, indicative the theory, is to review the see ready and willing to stay the issue, the answer is a qualifying one, which extremely means that the and morally wishes to say as or time that the dismissal be from the evidence.

A close consideration of the testimony of Tim. Tenny, indicative the disputed this qualifying difficulty to close this by. Even so, in our time year but willing to year the answer is evidence, it [illegible] verse of [illegible]. It is time that the testimony of Mr Ow ie, that he have by a lawyer and willing to the difficulty the raised his to close year to the [illegible]'s office, but this the Jones and only [illegible] the lawyers point to stay and that be more [illegible] to the

Mrs. Daube there at the same time; but his evidence further shows that on that occasion there was a conversation about the commission, and that the defendant said he would not pay a commission unless Mrs. Daube also paid a commission. The evidence of Blumenthal, also, fails sufficiently to show that a definite express understanding was arrived at between Mrs. Daube and the defendant. It is true that he testified that, on or about January 16, 1923, when he took Mrs. Daube to the premises and introduced her to the defendant, there was a conversation between Mrs. Daube and Brown, concerning the terms upon which the property might be leased, but, it is his testimony that after these matters had been discussed, he told the defendant that he, Blumenthal and Mrs. Daube, would come back the first of the week, and that Mrs. Daube said she would let the defendant know in a few days.

Of course, that testimony does not prove that Mrs. Daube was ready and willing to take the lease, nor does the testimony of Kersey, one of the plaintiff's salesmen, as to a conversation with the defendant on January 27, help to show that Mrs. Daube was ready and willing to take the lease. Kersey's testimony, as a matter of fact, only pertains to the question whether or not the defendant himself was willing to make the lease, and, on that subject, suggests that, at the time of that conversation, the defendant intimated that he did not want to give the lease unless another flat was obtained for him and his wife.

further above

There was testimony by Mrs. Blumenthal, wife of the former witness by that name, that two or three days after January 18, Mrs. Daube called her up on the telephone, and asked to speak with Mr. Blumenthal; that Mrs. Daube said, "I wanted to find out about that lease on the apartment building. If I can't get that lease, I am going to hurry round and get something else, because the time is getting short." That testimony was objected to on behalf of the defendant, on the ground that the defendant was not present. The trial judge, admitted it, on theground that it was competent as showing her intention and willingness. That was correct. It was evidence pertaining to whether or not she was willing to take the property. Her acts on that subject had to be proved, and to show what she said was competent. But taking it as competent, and considering it in conjunction with all the other testimony, we do not think a case of any substance was made out against the defendant. The evidence seems to fail entirely in definiteness; that is, even though the testimony of the witnesses for the plaintiff be taken as the truth, it still obviously fails to show that the plaintiff produced a tenant, ready, able and willing to rent the premises at $6,000 a year.

Such being the case, it becomes our duty to reverse the judgment, on the ground that it is manifestly against the weight of the evidence. The judgment will be reversed, with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find that the plaintiff did not furnish

Tracy was speaking to Mrs. Blumenthal, while at the dinner attended by that lady, that he or Miss Jane Grey Jacquery is, Mrs. Blumenthal has a son in the Diplomatic, and hopes to work with Jr. Jacquery, that Mrs. Blumenthal "I wanted to find out more that Jane is the mysterious building. If I can's get that image, I am going to hurry round and get something else, because the time is getting short." That question was delivered in behalf of the Jacquery, on the grounds that the Jacquery was not growing. The Grey Party, analyzed it, we discovered that it was made persons as growing for industrial and military. That was measure. It was without permitting to receive as not the was willing to hair the property. For note in this analysis but is to power, was to show that the was was important. But being is a principal, and monitoring is to employing with all the labor relations, we do not think a year of any whatever was made against the Jacquery. The military were to Bill certainly in relationship year Ja, year though the finding of the attorney for the finality to claim to the land, if will involuntary this to show and the Jacquery reached a result, finally, this had willing to work the greatest of Jr.,to a year.

Lord Jacquery the area, is reason was duty to receive the property, on the ground that is a unanimity against the weight of the military. The property will be presented, with a finding of fact.

[illegible]

[illegible]

[illegible]

a tenant, ready, able and willing to lease the premises.

O'CONNOR, P. J. AND THOMSON, J. CONCUR.

123 - 28775

JOSEPH T. RYERSON & SON,
a corp.,

Appellee,

v.

THOMAS J. PHEEN, ET AL,
On appeal of ANDREW H. HANSEN,

Appellant.

235 I.A. 621

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 30, 1934.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 10, 1933, the appeal of Andrew H. Hansen, one of the defendants in this cause, was consolidated for hearing with General No. 28774, and as the opinion this day handed down in General No. 28774 is decisive of all the questions that arise in this case, General No. 28775, the decree herein appealed from is reversed and the cause remanded with directions to enter a decree in accordance with the principles laid down in General Number 28774.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

162 - 33316

E. A. ARMSTRONG and A. J. HASENBALG, doing business as ARMSTRONG and HASENBALG, Appellees, v. JACOB B. WELVERT and ODILE WELVERT, his wife, Appellants.	235 I.A. 621 APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiffs, Armstrong and Hasenbalg, licensed real estate brokers, brought suit against the defendants, Jacob and Odile Velvert for a real estate commission which the plaintiffs claim to be due them by reason of the sale of certain real estate of the defendants. The case was tried before the court, without a jury, and resulted in a judgment for the plaintiffs in the sum of $547.50. This appeal is therefrom.

The defendants, husband and wife, were the owners, in joint tenancy, of certain real estate known as 2015 Birchwood avenue, Chicago. Being desirous of selling the property, they listed it with various real estate brokers, among whom were the plaintiffs, Armstrong and Hasenblag. They also listed it with a real estate firm known as the Ridge Realty Company.

The testimony of Armstrong, one of the plaintiffs, is that the property was listed with him, or his firm, on

Opinion filed Oct. 30, 1934.

February 7, 1923; that he had had a talk with Odile Selvert at her residence. She testified that she listed it in the plaintiffs' office about February 23, 1923, and that she had already listed it with a number of other real estate brokers. It was listed by Odile Selvert, the defendant, with the Ridge Realty Company on February 15, 1923.

Negotiations in regard to the sale of the property were undertaken by the plaintiffs with one Paul Massi and his wife, Vern Massi. It is the evidence of the plaintiff Armstrong that he talked with Mr. Massi in regard to the building on February 8, the day before he went to see Mrs. Selvert; that he told Massi he would get the price for the building, and Massi said he would call at plaintiffs' office the next morning and look at the interior; that Massi did call on the morning of the 9th, and he and Massi went over,and, after some reluctance on the part of the tenants, looked through the building; that the next day, on the 10th, he, Armstrong, called up the defendant, Mrs. Selvert; that she called at the plaintiff's offices the afternoon of that day, and that he told her that he desired to see her; that a Mr. Massi had a $4500 mortgage on two flats that he had sold at 7318 North Robey street, and he, the witness, desired to know if she would consider that as a payment on the building, and if she would take back a third mortgage for $3,000; that Mrs. Selvert said that would be perfectly satisfactory, as she did not need cash; that he asked her if she would come down on her price; that Massi objected to the price, and she said,no, she would not cut her price at all; that she was asking $18,500; that at the time he offered the mortgages to Mrs. Selvert, his partner, Hasenbalg, was in the office; that he, the witness, told her he would take the matter

up with Mr. Massi and see what he could do; that after that Massi called and he had a talk with him; that he did not see the defendant, Mrs. Selvert, again until he met her on the evening of March 23; that at that time he asked her if she had sold her building, and she said she had; that he asked who bought it, and she said Mr. Massi; that he then said, "You know he is the man that I was representing;" that she said, "Yes;" that he then said, "How is it that you came to have another agent to close the deal;" that she said, "I don't know, I asked that question and the real estate man told me it didn't make any difference, it was the man who signed the contract;" that he then asked Mrs. Selvert how much money was paid on the contract; that she then told him $250 had been paid down; that he then said the deal has not been closed yet and "I wish you would not pay the agent his commission until it is decided who was to have the commission. I claim that he was my customer."

The witness Armstrong testified that a few days after Massi had made the original proposition to him, he told Massi that he had submitted it to the defendant, Mrs. Selvert, and that she would accept his mortgage and take the $3,000 second mortgage back, as suggested; that when Massi said he wanted the price cut he, the witness, told Massi that Mrs. Selvert said, "she would not cut her price, and for him to think it over, as it was a good buy at the price it was offered at;" that that was the last time he talked with Massi until he found out the property had been sold.

The evidence shows that Paul and Vera Massi owned a piece of property at 7316 North Ashby Street, and that it

up with one hand and her when he grabbed her shoulder. Then Manni walked and he had a fight with him that he did not see the Lakhanwala. By, Thirdly, Lajjo could be not has an the company of Manni Ali; that at that time he asked her if she had sex with anything, and she said, that he asked who knowing it, but she said he should, that he then said, "Then tell me if the fact that I was impressing" that she said, "Yes" that he then said, "Then is it true to say to very terrible night to alone the land;" that she said, "I don't know, I hated this reaction and the said which was said so it didn't make any difference, it was the one the signed the document" that he then asked her, Tehreen has work money and paid to the country that the film did its duty that he then said the first time and been chance you to "I with you would you say the wrong the conclusion until it is decided and was to have the conclusion. I think that he was my mistake".

The witness Zaghoomi testified that a day-long after Manni had had the religious procedure, he then said that he had mentioned it to his relatives, and, Thirdly, that the villa where the marriage had taken place, the second marriage was, he recalled that when Manni said he marry the villa, the villa, the villa, the villa, Manni said, "the world and not for reason, and for the be-cause it every, so if you a good bag of the Jaja, if you affair to city" then that was the less time he talking with Manni until he found out the property had been sold.

The witness stated that not the same house, a place of property as VGH been sold, that the

was sold by one Bloomberg, one of the partners of the Ridge Realty Company, the sale taking place on February 23, 1923, and the record shows that when counsel for the defendant undertook to offer in evidence that Massi received back a mortgage for $4500 as part of the purchase price, which mortgage was executed on or about March 7, 1923, the evidence was objected to and the objection sustained by the court.

In March 8, 1923 the property, for the sale of which the plaintiffs claim a commission, was sold by the defendants, to Paul and Vera Massi, his wife, through a written contract of sale, the purchase price being $18,250, and the defendants, the sellers, agreeing to accept a first mortgage lien in the sum of $4500 on the premises known as 7318 North Robey street. This transaction was conducted by Bloomberg, a partner in the Ridge Realty Company, at that company's offices.

The defendant, Mrs. Melvert, testified that she first went to the office of the plaintiffs between February 15 and the first of March; that she did not list her property with Armstrong at her home; that when she listed it with the plaintiffs she told them she had listed it with other brokers; that she simply told Armstrong he could sell the property for them, the defendants, and that she told them she would pay the commission. She further testified that Armstrong did not in the course of the first week in February, or on February 10, or at any time prior thereto, tell her that Mr. Massi was interested in the property. She denied that Armstrong told her that he had a client who was interested in her property, and that he was not able to pay cash, but that he had certain mortgages that he wanted to turn in in

lieu of cash. She denied that he said anything like that in substance on February 10, or prior thereto, but admitted that he did say that about March 1st or 3rd, after he had seen the property. She further testified that she first met Mr. Massi about the end of February or the first of March, about a week before she closed the deal; that she met him along with Armstrong, who came with Massi to her house. And, further, "He wanted to know if he could show Mr. Massi through the property, and I agreed, and he said to Mr. Massi, 'Oh, you are the man Mr. Velvert met yesterday,' Mr. Velvert had told him about him; Mr. Massi had told me he had this place on Robey street he wanted to sell, and then if he could sell this property, if the deal did go through, that he would buy our property"; that Massi told her that the contract for his property had been made but the deed hadn't passed, and that he wasn't ready to take up the Velvert place until he was sure his own deal was closed. It was also her evidence that she listed the property of the defendants with the Ridge Realty Company, through Bloomberg on February 15.

On cross-examination she testified that Armstrong brought Massi to her house and introduced him at the end of February or the first of March. She further testified that when she told Armstrong she would accept one of Massi's mortgages in part payment, that Massi had not sold the Robey street property, and did not sell it until February 23.

Paul Massi testified that he listed his Robey street property with the plaintiffs, and, also, with the Ridge Realty Company, in the fall of 1930; that he first

saw the property at 2015 Birchwood avenue, the sale of which is here in question, after he sold his own property on Robey street, but that his wife saw it before; that he told the real estate man that he had no money, but that if he could sell his Robey street property he would be willing to buy some other property; that he had to have somebody who would accept his mortgage; that his Robey street property was subsequently sold by Bloomberg, of the Ridge Realty Company; that the first time he saw the property of the defendants here in question, it was shown him by some party who was on the street; that he went in himself because he had seen it advertised in the paper; that the next day Armstrong showed him the place; that that must have been around March, after he had sold his Robey street property; that when Armstrong showed him the property nothing was said about the $4500 mortgage, as he had not sold his Robey street property, and that his Robey street property was not sold for two or three days after his first talk with Armstrong; that afterwards he told Armstrong to take his Robey street property off the books because it was sold; that that was the last time he saw Armstrong; that his wife, Mrs. Massi, first saw the property in question just before he did. He further testified that he did talk to Armstrong about the Robey street mortgage before February 10, but never talked with Armstrong about turning in a mortgage at any time before Bloomberg had sold his property. On cross-examination he testified that the day after he saw the property of the defendants, he saw Armstrong and told him that he had seen the property advertised, but that he did not know the price; that Armstrong then took him to see the

building; that Armstrong did not give him the terms on the property; that he got those from Bloomberg. After testifying that Armstrong did not give him the terms, he then testified that a few days after Armstrong gave him the price of $18,500, and that Bloomberg, four, five or six days afterwards got it reduced to $18,250.

The testimony ofBloomberg is that the property was given to the Ridge Realty Company for sale on February 15, 1923, by Mrs. Welvert, and was on that day listed in the Company's books; that the first time he spoke to Mr. Massi about the sale of the property was on February 23; that on that day the contract for Massi's Robey street property was signed, and he, the witness, spoke to Massi about the property here involved, and Massi said for him to take it up with Mrs. Massi; that he didso two days later, and took Mr. and Mrs. Massi over to the property; that Mrs. Welvert was there at the time; that that was on February 27; that at that time he stated the price to Mr. Massi; that he said, "he wouldn't do anything until he had settled on the deal on the first building;" that he took Mr. Massi over to the property in question on the following night, February 28; that the defendant, Mrs. Welvert, was there; that they went through the building; that after that occasion he, the witness, told Mrs. Welvert that Mr. Massi had offered to pay $18,250; that that was immediately after Massi had been shown the building, about March 1 or 2; that that is also the time he spoke to Massi about the mortgage; that after that, on March 2, he got Massi to sign the contract for the purchase of the defendants' property.

Counsel for the defendants have argued but two points, first, that the plaintiffs did not produce a buyer ready, willing and able to buy upon the terms given, and, second, that even assuming a sale was made to the Massie, with whom the plaintiffs had been negotiating, as it was brought about by the efforts of the Ridge Realty Company, the defendants are not obliged to pay a commission to the plaintiffs.

From the above resume of the evidence, it is obvious that there was a conflict in the evidence as to just what transpired, especially between Armstrong, the Massie and the defendants. But, if we assume, as we do, that Armstrong, after the property was listed with his firm, first called the attention of Mr. Massi to the property and took him over and showed it to him, and told him the price the owner was asking, and that the Massie, in a few days thereafter, bought the property for substantially the figure first given, we are bound to conclude that the plaintiff firm produced a buyer who bought the property, and is entitled to a commission. The evidence for the plaintiff, which the trial judge gave credit to, was amply sufficient to make out a case. It is true that some of it is contradicted by witnesses for the defendants, but that gave rise to a serious question of credibility, and concerning that, the trial judge was in a much better position than we are. Further, there are discrepancies in the testimony for the defendants that give rise to suspicions that may well have led the trial judge to the conclusion he reached. Of course, that being the situation, we are not justified in

overriding his judgment.

As to the contention that the Ridge Realty Company, through Bloomberg, brought about the sale, it is an answer to say that according to the evidence, which evidently the trial judge believed, all Bloomberg did was to finish up the transaction which the plaintiffs through Armstrong had, not only originally inspired, but was wholly responsible for as a procuring cause. It is true that the price first mentioned by Armstrong to Mazzi was $18,500.00, and that the sale finally consummated was for $18,350.00. The difference, as it pertains to the question who was the procuring cause, and who is entitled to commission, is negligible, especially in view of Armstrong's testimony that he told Mazzi, when the latter said he wanted the price cut, that Mrs. Velvert said she would not cut the price, and that he, Mazzi, had better think it over, as it was a good buy at the price offered. There is ample evidence going to show that the sale was the result of the plaintiffs' services.

In Wilson v. Mason, 158 I.1. 504, the court said, "If the principal accepts the purchaser thus presented, either upon the terms previously proposed, or upon modified terms and a valid contract is entered into between them, the commission is earned." Keeler v. Grace, 87 Ill. App. 427; Mechem on Agency, Sec. 969.

There was no material evidence of abandonment by the plaintiff. The fact that the contract of sale of March 8, 1933, was signed at the offices of the Ridge Realty Company does not demonstrate that the plaintiffs in any way failed to render the service which directly led to the com-

summated sale.

After carefully considering the record and the arguments of counsel, we feel that we are not justified in disturbing the judgment of the trial judge.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

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JOHN GILBERT, CHARLES BRIEGER and A. HENRY GOLDSTEIN,

Appellants,

v.

ETHEL M. MEHL, HERMAN F. MEHL, ET AL,

Appellees.

235 I.A. 621

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This cause was before us once before. Gilbert v. Lipsner Motor Co., 225 Ill. App. 657. On an appeal from an order of the chancellor appointing a receiver for the defendant, the Lipsner Motor Co., we affirmed the action of the chancellor. Since then, there has been a trial, which included a reference to a master, a report by him, confirmation of that report, the overruling of exceptions thereto, and the entry of a final decree. Jurisdiction, however, was retained so as to determine certain matters of final distribution.

As our opinion upon the former appeal contains a sufficient general statement of the facts constituting the gravamen of the plaintiffs' cause, it becomes unnecessary to restate them here. The chief claim of the plaintiffs is concerning 210 shares of the capital stock of the Lipsner Motor Company which were turned over by A. Henry Goldstein on July 7, 1920, to Walter H. Bisping. Goldstein admits that he turned over the 210 shares to Walter H. Bisping on July 7, 1920, but claims that it was only as security on a

Opinion filed Oct. 30, 1924.

lease made by him with the Company on that date. The records of the company show the cancellation of two stock certificates, one for 80 shares, and one for 130 shares. Each is marked "cancelled" in the hand writing of A. Henry Goldstein. They, also, show the issuance by the company, on July 7, 1920, of a certificate of 210 shares to Walter H. Bisping. At that time, Goldstein says he was treasurer, and, apparently, the certificate for 210 shares was signed by him as secretary. In the course of the short-lived and unsuccessful history of the company, it had but one substantially valuable asset; a two story brick garage and ground, located at 3536 N. Halsted street, Chicago. The capital of the company was $40,000.00, consisting of 800 shares, each of thepar value of $50.00. The purpose of the company was to deal in automobiles. On July 7, 1920, after some negotiations, a written lease of the garage from July 9, 1920 to July 9, 1921 for $3600.00, payable in monthly sums of $300.00, was made by the company to A. Henry Goldstein.

A. Henry Goldstein testified as to his ownership of stock in the corporation, and as to the deposit of the 210 shares with Walter H. Bisping. He stated that the original certificates for the $10,500.00 were, at the time he was testifying, in the hands of the secretary of the company; that he put them up as collateral with Mr. Bisping in the office of the secretary on or about July or August 1920, to guarantee the lease which was executed to him at that time, to insure the payment of the rent to the company pursuant to the terms of the lease; that he had never had

the certificates in his possession since; that he made a demand for the stock but it was never returned to him. Brisbin testified that Mehl said Goldstein's stock was up as security for the lease. The testimony of Harry Goldstein is somewhat ambiguous. He had been a tenant of the garage before the lease to his son, A. Henry Goldstein. He, Harry Goldstein testified that in a talk with Granand, he said, "If you want me to move, you give my security stock what we put down for the lease." On the other hand, when A. Henry Goldstein was endeavoring to sell more stock of the company to Bisping he wrote, "Could you see your way clear in helping us raise four or five thousand dollars. We have the stock to sell and I am willing to put up my own stock, if it is desired, as collateral to assure good results, because I know we can make a good bit," and it was after that letter that August Bisping and his son paid $5,000.00 for more stock. August Bisping testified that about July 7, A. Henry Goldstein wanted to rent the property and the rent was fixed at $300.00 a month, and that at that time Mehl was present, and Mehl said to Goldstein, "Henry, you ought to make good on your proposition and put up your stock to secure those people as you promised;" that Goldstein said he would do anything to keep them from losing a dollar; that there was then a meeting at Kramer's law office; that Goldstein took there the minute book, stock book and his stock; that Goldstein's stock was then transferred and a new certificate made out and signed by Goldstein and handed to him, Bisping; that there was nothing said about that certificate being delivered as security for the payment of rent on the lease, nothing of that kind said to anybody. Bisping

further testified that he bought certain stock on the strength of Goldstein's letter, the one referred to above. On cross-examination, he testified that when the certificate for 210 shares was made out it was intended in some way to remunerate him for possible loss that he might have in the company; that he did not know why it was made out to his son instead of him; that he himself did not want to hold it, did not want to be connected with it at any time; that it was Mehl who said to make it out to Bisping's son. Further, on re-examination he testified that "the great cry all along was that he, Goldstein, would give them the stock to secure them against loss." Mehl, who became interested in the property through Bisping, and who had an investigation made of the real estate, testified that he found A. Henry Goldstein had misrepresented the amount of the incumbrances on the garage; that at a meeting at which he agreed to advance a certain sum of money for a second mortgage, he had a talk with A. Henry Goldstein about Bisping's stock or interest in the company; that Goldstein was crying and said he did not want Bisping to lose a cent; that Goldstein said he would turn over everything to satisfy Bisping; that he, Mehl, said, "Why in the Glorious don't you do it;" that Goldstein said, "I will do it;" that they then talked about renting the garage; that it was finally agreed that Goldstein should lease it andpay $300.00 a month rent; that the lease was made the next day; that when they were at Kremer's office he saw Goldstein make out the stock certificate to Bisping; that Bisping said he wanted it made

out to his son; that nothing was said at that meeting or at any time about Goldstein depositing stock as collateral security for the lease.

The evidence of the son, Walter H. Bisping, corroborates that of his father. His testimony is to the effect that Goldstein in urging the Bispings to buy stock, said a number of times that he was willing at all times to put up his stock to secure them against loss on what they invested and that when he, the son, and his father had raised $3,000.00 on the son's home and $3,000.00 on the father's to invest in stock at the solicitation of Goldstein, the latter said that he was perfectly willing to take up the stock at any time it was deemed necessary to secure them against loss; that he, the son, received the 210 shares of stock from his father shortly after its date, July 7, and that it has been in his possession ever since; that in November 1930, Goldstein called him up and wanted to borrow some of that stock to put up as collateral at some bank, and that he, the witness, told Goldstein that he could not have any of the stock back until the Bispings had been paid what they had invested in the company's stock, as had been agreed; that nothing more was said on that subject. On cross-examination, he reiterated the statement that Goldstein said he was perfectly willing at all times to put up his stock to secure him and his father against loss. He, also, intimates that Goldstein was not told that the stock was necessary as security until it was found that Goldstein had misrepresented the amount of the incumbrances on the garage. The evidence of the defendant, Kranzmann, who was

and to tell them that nothing was left to that country or to any from their Dalkhania friendship which he had lifelong enjoyed for his issue.

The relations of his son, Baker H. Alexiev, remembered that of his father. His testimony is to the effect that Dalkhania is urging the Alexiev to buy stock, with a number of times that he was willing to sell them to put in his stock to which they refused that they lamented and that when he, the son, and his father had taken Dalkhania to the court house and Dalkhania on the witness to invite in order to the violations of Delphania, his father said that he was perfectly willing to take to the stand at any time it was deemed necessary to adjust that business. That he, the son, supplied all the money of joint fund the former shortly after his death, July 7, and that it has been in the possession ever since. That in September 1919, Dalkhania called his to not wished to borrow some of this stock to put to an unlisted by some bank, and that to the witness, said Dalkhania that he could not have any of the stock back until the dividends had been paid which they had invested in the company's stock, as had been agreed, this nothing was said to that subject. On cross-examination, he indicated the substance that with which said he was perfectly willing to all items in his to his great to answer his and the stock **against loss.** He, also, indicated that Dalkhania was not this for the stock was monopoly to actually until it was found that Dalkhania had abbreviated the amount of the investments on the page. The relations of the defendant, Thomas, who was

present and took part in the meeting of July 7, 1920, in Kremer's office, at which time the lease to Goldstein was made out, and at which Mehl, Goldstein, Bisping and Kremer were present, is to the effect that nothing was said in his, Brennand's presence about an assignment of Goldstein's stock as security for the lease. Kremer, who was present at the meeting, testified that nothing was there said about Goldstein transferring stock as security for the payment of rent. The evidence of one Golde, who acted as attorney for one Grichter in a suit on a note against Goldstein and others, is that on one occasion Goldstein told him that he had pledged his stock with some one and that he had gotten some advance or loans and that when he made the payments or adjustments he would get it back. The record shows that upon the original application for the appointment of a receiver, and while Brennand was on the stand, and shortly after he had stated that the Bisping stock was one of the matters in dispute, the chancellor said to Goldstein, "Are you trying to take care of this Bisping with this $12,000.00 of stock," and he answered, "He has got his stock. I am willing to give him half of my stock, even, to pay him back and reimburse him on his initial investment."

The Master, to whom the matter was referred, found that the claim of Goldstein that he, on July 7, 1920, deposited the 210 shares with Walter Bisping, treasurer of the company, as security for the lease, was not sustained by the evidence. The Master, also, found that on that date Bisping was not treasurer, but that Goldstein himself was both secretary and treasurer. The decree of the chancellor follows the

present and took part in the meeting of July 7, 1880, in Governor's Hall, we did not know the large so-called men made up, and so knew not, Gladstone, Bright and Kenmar was present, in an elegant long coating was said in his, Kenmar's address about to assignment of Gladstone which so monstly for the Irish. Kenmar, who was present at the meeting, twelfth does usually was then well know Gladstone manufacturing which so monstly his not payment of work. The evidence of our Bills, was asked to answer for our reviews in a suit on a lone against Gladstone and others, in that on our evaluation Gladstone said his then he had judged his whole work from one and that to have gained some advance or issue and that work be made his property or adjustments he would get it back. The record shows that upon the twelfth application for the appointment of a receiver, and with Fenton and on the other, but shortly after he had stated that the digging about was on of the matters in dispute, the commission will be "Gladstone, like you trying to take away of this digging with this [illegible] of issue," and to observed, "He has put his claws. I am willing to give his hold of my shoes, even, to pay his land and relinquish his or his Bailiff's investment."

The Judge, to whom the matter was referred, found that the claim of Gladstone that he, on July 7, 1880, the premises the 200 shares with Water digging, treasurer of the company, in consulting for his issue, was not [illegible] for [illegible]. The matter, also, shows that on the date [illegible] was not investment, but that Gladstone himself was both secretary and treasurer. The jurisdiction of the [illegible] [illegible] the

finding of the Master. It finds specifically that the 210 shares are held by Walter H. Bisping as security for any loss that he and his father might suffer because of the purchase by them of $10,000.00 of stock in the Lipsner Motor Company.

From the foregoing resume of the evidence the conclusion seems inevitable that we are not now, on this review, entitled to override the finding of the Master and the decree as to the claim of Goldstein to the 210 shares of stock. He admits that he signed the two certificates and that they were, by him, voluntarily delivered; in other words the possession of them by Walter H. Bisping is admitted to be originally rightful. And such being the case, the burden was upon Goldstein to prove by a preponderance of the evidence that they were held as security for the lease. On the latter subject, the evidence is conflicting; and taking, alone, the evidence of Goldstein himself, it contains such discrepancies and is so confusing, that it fails in persuasiveness. It may be that the stock was put up to secure the lease, but with the evidence as it is, we do not feel justified in setting aside what the chancellor ordered. The Master saw the witnesses and, so, was better able to judge of their credibility than we are. It is true that his findings are to be considered only as advisory. Still, where, as here, the conflict in the evidence is radical, and the subject of credibility is paramount, and we are at the disadvantage of being confined merely to what the record discloses, we feel that justice requires that the findings be allowed to remain undisturbed. It is claimed for Goldstein that

in the original answer of the company, it was alleged that the 210 shares of stock were not only not deposited as security for the lease, but were assigned to Bisping "as an individual and as and for his sole and only property," and that the stock is the property of Bisping; and, further, it is claimed that both the Bispings alleged in their original answer that the 210 shares were the absolute property of Walter H. Bisping and it is argued that such allegations are inconsistent with the proof and findings. What force there is in that argument is very slight. The defendant Walter H. Bisping merely claimed more than the proof showed he was entitled to, and not less.

It is, also, urged for Goldstein that the chancellor erred in allowing the defendants, the Bispings, to file an amendment to their answer on the day the Master's report was filed. The amendment purported to make the pleadings correspond with the proof. As far as Goldstein was concerned, it did not work any hardship. At the hearings, Goldstein had undertaken to prove that the stock was given only as security for the lease, and the Bispings had undertaken to prove that they held it to secure them against loss on their purchase of stock. The amendment did not retract any admissions, it reduced the claim of absolute ownership to a claim of qualified ownership, and in a sense was to the advantage of Goldstein. We do not think the court abused its discretion in allowing the amendment. Further, we do not find that any objection was made at the time it was offered. Counsel have cited a number of cases on the subject, but none of them holds

In the original manuscript of the lecture, it was stated that the SIO Bureau of Statistics not only had dropped as security for the loan, but was assisting in stating "as an individual loan we put the sale with additional provisions," and that the stamp in the memorandum of financing was, further, it is stated that here the Bureau acting in their original manner that the SIO officers were the absolute property of Julian S. Fleming and it is signed that such alterations are inconsistent with the usual use finance. That fact shows it is this statement is very slight. The Bureau failed to disclose certain dealing more than the proof showed be was entitled to, and was lax.

It is, then, argued for defendants that the conversion cause is already one criminal, the implying, as this is considered to exist because on the day the marshal removed the field. The conclusion presumes to mean the plaintiffs conspiring with the proof. So far as this claim conversion, it was not more than tortious. As the homicide, indicates the conversion to prove that the stock was given only as security for the loan, as the finding for monetary to cover the trip indicate to evade the original loss on their purchase of stock. The government did not attempt any conversion, to reduce the stock to immediate ownership on a plain of creditors recovery, and in a sense was to the attempts of conversion. It is the fact that court cause its discretion. It directed for recommendation. Finally, on the jury was any objection the lack of the fact it was stated. Counsel had based a conduct of matter in the original, but none of this point

contrary to our conclusion. Technically considered, as it worked no hardship on Goldstein, it was the duty of counsel for the Bispings to offer the amendment, and thus avoid a possible variance. Haskell v. Brown, 65 Ill. 39; Lee v. Keola Elevator Co., 281 Ill. 143; Telford v. Russell, 220 Ill. 57.

It is claimed, also, that, even if Goldstein wrote that he was willing to put up his own stock as collateral, and the Bispings afterwards bought stock and relied upon the written statement in making their purchase, it did not give rise to a contract of indemnity. With that we do not agree. Here, no third person was involved. Goldstein made a proposal and the Bispings accept it, and that acceptance merely involved their doing a certain original thing, the purchase of a certain stock. When that stock was purchased there then came into being, apart from all else, having no relation to any one else's obligations, an original, and in no way, collateral contract. Being an original contract, it was one of indemnity, and so, not within the purview of the Statute of Frauds. Abend v. West, 65 Ill. App. 267. Counsel for the complainants has argued, at large, the charges of conspiracy and the right to the appointment of a receiver. That subject, however, is not now material as the record shows that a receiver was appointed, and, as the master found, by stipulation of all the parties, the corporation was to be dissolved, "and that all the assets of said company have been sold by the mutual consent of all concerned, by the receiver" with the exception of a Stutz automobile to be delivered to

the receiver to be sold.

Jacob Goldman was originally appointed receiver, but on May 14, 1933, he was removed and the Chicago Title and Trust Company appointed in his stead. The final decree was entered on May 26, 1933. That decree provided for a dissolution of the company, filing of claims by creditors, and decreed the order in which the money in the hands of the receiver should be distributed. It also ordered that the Stutz automobile should be turned over to the receiver to be sold. The decree ordered, after providing for certain court costs, Master's fees, receiver's and attorney's fees, and mortgage liens, that "the balance of the money in the hands of the receiver shall be distributed among the stockholders " " " pro rata according to their respective holdings." This, it is contended, was erroneous, and it is claimed the distribution should have been on the basis of the money invested. With that we cannot agree. There is nothing in the pleadings or evidence that would justify such a distribution. Further, the interest of the parties as stockholders is to be determined, not by the price they paid for their stock, but by the ratio between the stock they owned and the total capital stock.

It is claimed that Bronand ought to have been ordered to turn over to the receiver certain sums of money which are itemized in his sworn account of June 1, 1933, but as there is no evidence challenging any of the items, we are bound to recognize it as the truth.

It is claimed that the court erred in directing that the expenses of the receivership and costs expended by the complainants should be paid out of the fund. With that we do not agree. The Master and the Chancellor concluded that the proof failed to establish the conspiracy charged, and after a careful consideration of the evidence as disclosed by the record, we do not feel justified in overriding their judgment. The decree will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

19[illegible]-[illegible]

235 I.A. 621

FRANK MANCL, Appellee, vs. FRANK A. SOULD, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The defendant's automobile having collided with the rear of an automobile of the plaintiff and the gasoline in the rear tank of the plaintiff's automobile having thereafter immediately become ignited, as a result of which the plaintiff's automobile was practically burned up, the plaintiff brought suit and recovered a verdict and judgment against the defendant in the sum of $1300.00. This appeal is from that judgment.

The evidence is practically without conflict. On the afternoon of July 24, 1920 the plaintiff was driving a "Monroe" automobile in the City of Milwaukee. At his right sat his son-in-law, Hagemann, and in the rear seat, his daughter Helen. After driving about a mile, he stopped and had the gasoline tank filled, so that it then contained about twelve gallons. Then driving south on 22nd Avenue, and as he approached Arthur Street, an east and west street, he saw ahead of him a crowd of people which had collected, chiefly on the right hand side of 22nd Avenue. He then drove slowly to the left hand side of the crowd. 22nd Avenue was about the width of an average street. Hagemann says the plaintiff's automobile was then going about five miles an hour. The plaintiff's daughter

says it was not traveling very fast as it passed the crowd. The plaintiff says he drove slowly about five miles an hour to the left side of the crowd, and just as he had about passed the crowd he heard a bump; that he looked around and saw the gasoline splash around to the right; that all of a sudden a flame came out; that then they all jumped out and watched the fire; that at the time the defendant's car was up against the rear and both were burning. The plaintiff's daughter testified, as to the collision, that she felt the bump and turned around and saw the flames; and that was corroborated by Hagemann. The defendant, on the afternoon in question, had undertaken to drive his automobile from Milwaukee to Evanston, and on 22nd Avenue, was driving behind the plaintiff. He testified that just before the collision, he noticed a crowd that took up almost the entire street; that he turned to the left and followed another automobile through a narrow passage between the crowd and the left hand curb, going about seven or eight miles an hour, the same as the automobile that was ahead; that just as he got through the crowd, the one ahead stopped suddenly; that he, the defendant, did not have time to put the brake on and stop, and so hit the automobile ahead in the rear, and that immediately "everything" was in flames; that he did not see any signal given from the automobile ahead; that there was no rear bumper or tire carrier on the rear, so that the gas tank was the first thing his automobile came in contact with. On cross-examination he says he was about six or eight feet behind the other automobile when passing the crowd. The plaintiff, his daughter and son-in-law all say that the plaintiff's automobile was moving slowly at the time they felt the bump or jar. On that subject

there is a conflict, as the defendant testified that the other automobile stopped suddenly and without warning. Examination of the gas tank, after the collision, showed a ragged, but somewhat diamond shaped hole three inches wide and six inches long in about the center of the tank near the top. As a result of the fire, both automobiles were practically destroyed.

(1) It is contended that as the collision occurred in Milwaukee, Wisconsin, the law of that state must be applied. But, in answer to that, we do not find anywhere in the record any proof of what the law of Wisconsin is; and such being the case, we must presume it to be the same as that of this state.

(2) It is contended that the evidence totally failed to prove that the fire was caused by the defendant's negligence. No claim is made that the defendant's automobile did not strike that of the plaintiff. But it is urged that, although the defendant's automobile struck that of the plaintiff, and although practically contemporaneously, the fire occurred, it does not necessarily follow that the collision was the proximate cause of the fire. With that argument we are unable to agree. There is evidence that the collision and the fire were practically simultaneous, and there was a puncture in the gas tank such as would naturally be caused by such a collision, when there was neither bumper nor spare tire. With such evidence, it would be unreasonable to conclude that it did not sufficiently justify the verdict.

The case of Warren v. St. Louis & S.F.R.Co. 77 S.W.87, is cited to support the defendant's contention. But in that case there was an obvious hiatus in the chain of proof. The question

there was whether a street car had actually struck the deceased; who was found dead near the truck. The evidence tended to show that he was not struck by the car, but that he had been thrown from a cart in which he was riding, as a result of the horse running away. Witnesses, who had been passengers on the street car at the time, testified that they did not see him nor the horse and vehicle; and that the street car was not involved. The court held that there was a lack of proof of causal connection. In the instant case, as to the proximate cause, there is that quantum and quality of evidence which satisfies the mind. The admitted collision, the particular puncture of the tank, the evidence as to the splash of the gasoline, and its immediate ignition, constitute a sequence of events that justifiably lead to but one conclusion, that which the jury itself reached, and that is, the injury complained of was caused by the negligence of the defendant.

(3) It is contended that error was committed in permitting counsel for the plaintiff, upon cross-examination of a defendant's witness, to insinuate that the defendant was insured and that a judgment, if obtained, would be paid by an insurance company. The defendant called one Johnston, a dealer in Monroe automobiles, and he testified that a Monroe automobile in June or July 1930 was worth about $1,375.00, and after being run 400 miles it would only be worth $850.00, being considered a second-hand car. That was the substance of his direct testimony. On cross-examination he was asked if he knew Mr. Pastlenck, who was at the time the defendant's attorney. He answered, "No, I

don't - not before." He was then asked if he had ever testified in any other case where Postelnek's firm appeared as attorneys, and he answered, no. He was then asked "Do you know the name of his firm ?" and he answered, "I believe I have been told that it is some insurance company. I really don't know the name of it, to tell you the honest truth." At the close of the cross-examination, counsel for the defendant asked leave to withdraw a juror on the ground that counsel for the plaintiff had brought out the fact that the defendant was represented by an insurance company. The trial judge, on the ground that the objectionable matter was volunteered and was not responsive to the question, denied the request. Asked the limited, simple and direct question whether he knew the name of the defendant's attorney's firm, could not, properly considered and pertinently answered by the witness, involve or imply, by innuendo or otherwise, any question whether the defendant was protected by insurance.

In Aithen v. Jeffery, 259 Ill. 372, counsel for the plaintiff asked a prospective juror, after he had stated that he did not know either of two persons whose names were mentioned, whether he knew the Fraternal Insurance Company. On the ground of the impropriety of that question, a motion to discharge the panel was made. It was overruled, and in the opinion of the Supreme Court, on review, it was said, "It is not proper for an attorney to directly inform a jury that a defendant is insured against liability in the suit on trial, and, of course, the attorney cannot be permitted to accomplish the same result indirectly in the examination of

jurors." In the instant case the jury were not not only directly informed, but it is at the most questionable whether they were even indirectly so informed. Counsel for the defendant has cited Volkman v. Kreisman, 189 Ill. App. 188. There, however, the objectionable matter was present in both the testimony and the argument of counsel to the jury. In the instant case, as it is extremely improbable that the matter received any consideration whatever by the jury, and as the testimony in question was not called for by the question, but was wholly voluntary, this contention must be overruled.

(4) It is further contended that the damages were not properly proven, and, also, that the amount allowed is excessive. Pietz who sold the plaintiff the automobile a few weeks before it burned, testified that he was an automobile salesman, and that the value of such an automobile after it had been driven for a month, and in that time, 400 miles, was $1500.00; and Behrmann, also, in the automobile business, testified that the plaintiff's automobile, after it was burned was worth about $75.00 as junk. It is true that one Johnston, who had been in the automobile business, testified, when called by the defendant, that although it was worth $1,275.00 in June or July 1920, yet, having been run 400 miles, it was then only worth $850.00. But the jury heard the evidence and fixed the damages at $1200.00, and, after carefully considering the record, we do not feel justified in overriding their

verdict.

Finding no substantial error in the record, the judgment is affirmed.

AFFIRMED.

THOMPSON, J. CONCURS,
O'CONNOR, P. J. SPECIALLY CONCURRING:

I agree that the judgment should be affirmed because the liability of the defendant is clear. But the cross-examination of defendant's witness Johnston as to whether he knew defendant's counsel was clearly improper. The only purpose of such question was to elicit the fact that defendant's counsel were connected with a liability insurance company.

AT A TERM OF THE APPELLATE COURT,

gun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 622

esent--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 2 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

41448

235 I.A. 622

W. R. Hunter,)
Appellant,)
vs.) Appeal from the Circuit Court of
H. H. Troup and Walter C. Schneider,) Kankakee County.
Appellees.)

Partlow, J.

Appellant, W. R. Hunter, began an action of assumpsit in the circuit court of Kankakee county, against appellees, H. H. Troup and Walter C. Schneider, to recover a $5000 attorney's fee alleged to be due. The declaration consisted of a special count alleging the services performed, together with the common counts. Appellees filed the general issue, together with notice of special matters to be proven on the trial. Upon a hearing on the pleadings, judgment was rendered in favor of appellees. An appeal was prosecuted to this court and the judgment was reversed. The cause was again tried in the circuit court before a jury, and at the close of the evidence on behalf of the appellant, the court directed a verdict in favor of appellees. To review the judgment entered upon the verdict, an appeal has been prosecuted to this court.

Madeline E. Huling died testate, in Kankakee county, on June 30, 1914, leaving a brother and a sister as her only heirs at law. She was not upon good terms with either the brother or sister and made no provision for them in her will. Her husband had died in 1902, and appellant had been her legal adviser and had assisted her in many of her financial investments. On December 9, 1913, appellant prepared her last will and testament, disposing of about $120000 worth of property, principally to charitable purposes, and providing that after the payment of certain specific bequests the residue of her estate should go to a charitable corporation to be organized to be known as "The

Appellant, W. V. Hunter, began an action of assumpsit in the circuit court of Kanawha county, against appellees, R. E. Trout and Walter H. Johnson, to recover a [illegible] fee alleged to be due. The declaration consisted of a special count alleging the services performed, together with the common counts. Appellees filed the general issue, together with notice of special matters to be proven on the trial. Upon a hearing on the pleadings, judgment was rendered in favor of appellees. An appeal was prosecuted to this court and the judgment was reversed. The cause was again tried in the circuit court before a jury, and at the close of the evidence on behalf of the appellant, the court directed a verdict in favor of appellees. To review the judgment entered upon the verdict, an appeal has been prosecuted to this court.

Madeline A. Hunter died testate, in Kanawha county, on June 20, 1916, leaving a brother and a sister as her only heirs at law. She was not upon good terms with either the brother or sister and made no provision for them in her will. Her husband had died in 1902, and appellant had been her legal adviser and had assisted her in many of her financial investments. On December 2, 1912, appellant prepared her last will and testament, bequeathing or about $120000 worth of property, including to charitable purposes, and providing that after the payment of certain specific bequests the residue of her estate should go to a charitable corporation to be organized to be known as "The [illegible]

Madeline Huling Home for Poor Aged Worthy Persons", and to be located at Kankakee, Illinois. The will gave to the three daughters of appellant all of the household goods, silverware, jewelry and other personal property in the home of the testatrix of the value of about $11,000. Appellees, H. H. Troup and Walter C. Schneider, were appointed executors and trustees under the will, together with W. I. Holcomb, now deceased. The will was left in the custody of the appellant, where it remained until after the death of the testatrix.

At the time of her death, appellant held Mrs. Huling's promissory note for $5,000, which he alleged represented money he had advanced to her in her financial investments together with fees due for services which he had rendered to her as her attorney. This note on its face was payable at her death. Mrs. Huling, during her lifetime, gave to appellant $2,000, which he says he kept in currency and which he testified she directed him to use in any manner he saw fit or necessary in the event of a contest of her will so as to have the necessary means to carry on litigation to sustain the will in case it was contested.

In 1908, Mrs. Huling executed a deed to appellant, as he claims, as security for money she owed him. Later the note for $5,000 was delivered to him and he testified he returned to her the deed. He also testified that later this deed was redelivered to him by Mrs. Huling and he had it in his possession at the time of her death. This deed conveyed to appellant the premises occupied by Mrs. Huling as her homestead. Appellant testified that when Mrs. Huling delivered the deed to him the last time, she said, that he "take the deed and if the will was set aside to put this deed on record and then deed it to some charitable institution that would fight them to a finish." He further testified he asked her what should be done with the deed in case the will was sustained, and she said, "Well, you just keep it and watch things and if my estate is administered and goes according to my wishes, you can destroy it or give it to the trustees. If in your judgment things are not going as would suit me if I knew it, then I would want you to

Helene Maling home for Poor Aged Worthy Women", and to be located at Kankakee, Illinois. She will gave to the three complainants of appellant all of the household goods, silverware, jewelry and other personal property in the home of the testatrix of the value of about $1,000. Appellees, M. A. Troyp and Walter G. Zimmelder, were appointed executors and trustees under the will, together with W. I. Holcomb, now deceased. The will was left in the custody of the appellant, where it remained until after the death of the testatrix.

At the time of her death, appellant held Mrs. Maling's promissory note for $3000, which he alleged represented money he had advanced to her in 1911 and Fifteenth Presidency Congress with fees due for services which he had rendered to her as her attorney. This note on its face was payable at her death. Mrs. Maling, during her lifetime, gave to appellant $2000, which he says he kept in currency and which he testified she directed him to use in any manner he saw fit or necessary in the event of a contest of her will so as to have the necessary means to carry on litigation to sustain the will in case it was contested.

In 1908, Mrs. Maling executed a deed to appellant, as he claimed, security for money she owed him. Later the note for $3000 was delivered to him and he testified he returned to her deed. He also testified that later this deed was redelivered to him by Mrs. Maling and he had it in his possession at the time of her death. This deed conveyed to appellant the premises occupied by Mrs. Maling as her homestead. Appellant testified that when Mrs. Maling delivered the deed to him the last time, she said, "take the deed and if the will was set aside to put this deed on record and then deed it to some charitable institution that would right them to a finish." He further testified he asked her what should be done with the deed in case the will was sustained, and she said, "Well, you just keep it and watch things and if my estate is administered and good according to my wishes, you can destroy it or give it to the trustees. If in your judgment things are not going as would suit me if I knew it, then I would want you to

do just what you think I would do if I were here."

Immediately after the death of Mrs. Huling, appellant notified the executors and trustees of the existence of the will, and he was employed by them as their attorney in the settlement of the estate. He informed them of the $2000 which he had in his hands to be used in resisting a contest of the will, but he did not tell them anything about his deed to the homestead and his secret instructions as to what disposition should be made of it by him. The will was admitted to probate, and shortly thereafter a contest was threatened by the sister and the brother who had been omitted from its provisions. This contest was settled by means of a fund raised by the beneficiaries to be used in taking care of the brother and sister as long as they lived. Appellant was active in securing this compromise and claims he spent $300 of the $2000 for that purpose.

About April 19, 1917, the estate had been fully administered with the exception of the provisions for the home for aged persons. Appellant testified that at that time his services to the executors and trustees ceased, although there is very little evidence to sustain this contention. On the breaking out of the war, appellant testified he devoted his time for two years to the activities incident thereto and paid no attention to his law practice, and had no thought but what the executors and trustees were frugally preserving the estate. In 1919, when he resumed his law practice, he testified he examined the records of the estate since 1917, and discovered that notwithstanding the fact that the will provided the executors and trustees should only receive $6000 for their services, which amount had been paid them, he discovered they had drawn $3000 in addition thereto, which in his opinion they were not lawfully entitled to receive, and which he felt was a breach of trust imposed upon them by the testatrix; also that they had otherwise improperly administered the estate. He testified he thereupon determined that the time had come for him to act as directed by the testatrix and accordingly he placed the deed on

do just what you think I would do if I were here."

Immediately after the death of Mr. Whitney, appellant notified the executors and trustees of the existence of the will, and he was employed by them as their attorney in the settlement of the estate. He informed them of the $6000 which he had in his hands to be used in resisting a contest of the will, but he did not tell them anything about his deed to the homestead and his secret instructions as to what disposition should be made of it in case. The will was admitted to probate, and shortly thereafter a contest was instituted by the widow, [illegible] been defeated from the residue. [illegible] means of a fund raised by the contestants to be used in taking care of the property and always [illegible] was active in securing this compromise and claims he spent $500 of the $6000 for that purpose.

[illegible] with the exception of the provisions for the home for [illegible] Appellant testified that at that time his services to the executors and trustees ceased, although there is very little evidence to sustain this contention. On the breaking out of the war, appellant testified he devoted much time for two years to the activities incident thereto and paid no attention to his law practice, and had no thought but that the executors and trustees were faithfully preserving the estate. In 1919, when he resumed his law practice, he testified he examined the records of the estate since 1917, and discovered that notwithstanding the fact that the will provided the executors and trustees should only receive $6000 for their services, which amount had been paid them, he discovered they had drawn $3000 in addition thereto, which in his opinion they were not lawfully entitled to receive, and which he felt was a breach of trust imposed upon them by the testatrix; also that they had otherwise improperly administered the estate. He testified he thereupon determined that the time had come for him to act as directed by the testatrix and accordingly he placed the deed on

record from Mrs. Huling to him and he executed a deed conveying the homestead to The Young Women's Christian Association of Kankakee. Thereupon the appellees filed their bill in the circuit court of Kankakee county against appellant and the Young Women's Christian Association in which appellees sought to set aside the deed from Mrs. Huling to appellant, together with the deed from appellant to the Young Women's Christian Association. Upon a hearing the deeds were set aside and an appeal was prosecuted to the Supreme Court, where the decree was affirmed (300 Ill. 110) upon the ground that the deed from Mrs. Huling to appellant had never been delivered; but the costs of this suit were taxed against the estate. It also appears from the record that appellees began suit against the appellant for an accounting for the $2000 paid to him by Mrs. Huling. The trial court, after allowing credit for certain expenses and attorney's fees, rendered judgment against him for about $700. An appeal from that judgment is now pending in this court. After all this litigation had been carried on between these parties, appellant began this suit against appellees to recover the $5000 attorney fee for services rendered prior to April 1917. The evidence consisted of the testimony of appellant who testified to the labors performed, together with the evidence of six lawyers who testified the services were worth from $4000 to $5000. The decree setting aside the deed from Mrs. Huling to appellant was also admitted in evidence. At the close of the evidence, on behalf of the appellant, the court directed a verdict in favor of the appellees, and this appeal followed.

The sole question upon this appeal is whether or not appellant, by his failure to inform appellees of the deed which he had from Mrs. Huling, deprived himself of the right to recover pay for the services which he performed for them as attorney in the settlement of the estate.

The contention of the appellant is that the real client of both parties and the real party in interest was the estate of Mrs. Huling; that both appellant and appellees were working for that

receipt from Mrs. Muling to him and he executed a deed conveying the interest to the Young Women's Christian Association of Hankins. Thereupon the appellees filed their bill in the circuit court of Hankins county against appellant and the Young Women's Christian Association in which appellees sought to set aside the deed from Mrs. Muling to appellant, together with the deed from appellant to the Young Women's Christian Association. Upon a hearing the deeds were set aside and an appeal was prosecuted to the Supreme Court, where the decree was affirmed (300 Ill. 110) upon the ground that the deed from Mrs. Muling to appellant had never been delivered; but the costs of this suit were taxed against the estate. It also appears from the record that appellees began suit against the appellant for an accounting for the $2000 paid to him by Mrs. Muling. The trial court, after allowing credit for certain expenses and attorney's fees, [illegible] $700. An appeal from that judgment is now pending in this court. [illegible]

These parties, appellant began this suit against appellees to recover the $2000 attorney fee for services rendered prior to April 1917. The evidence consisted of the testimony of appellant who testified to the labors performed, together with the evidence of six lawyers who testified the services were worth from $4000 to $5000. The decree setting aside the deed from Mrs. Muling to appellant was also admitted in evidence. At the close of the evidence on behalf of the appellant, the court directed a verdict in favor of the appellees, and this appeal followed.

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The contention of the appellant is that the real client of both parties and the real party in interest was the estate of Mrs. Muling; that both appellant and appellees were working for that

estate to accomplish the same purpose, namely, to give this property to a charity, and that it did not make any difference whether it went to a charity under the will or under the deed; that even if there were a conflict in interest, that conflict would not prevent appellant from recovering for services rendered in good faith until his employment ceased in April, 1917, before the unfaithful acts charged against him took place; that the acts complained of were done by appellant in carrying out Mrs. Huling's instructions to him; that the claim of inconsistency must of necessity be founded upon the belief that appellant at all times thought appellees were going to be unfaithful when such is not the case; that the interest of the estate is paramount to the interest of appellees; that the real test of conflicting interests which deprives an attorney of his fees is whether the attorney is shown to have violated some duty to his client by using against the client some information which he had received from his employment by that particular client; that the appellees seem to think this is their estate and their property, and that the beneficiaries are the objects of their bounty.

In support of these contentions, appellant cites I Thorton on Attorneys at Law, page 314, section 176, where it is said: "The test of inconsistency is not whether the attorney has ever been retained by the party against whom he proposes to appear, but whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, or whether he will be called upon in his new relation to use against his former client any knowledge or information acquired through their former connection."

We do not think the inconsistency in this case depends upon appellant's having been employed by a former client and the knowledge which he obtained while so employed. The defense is based upon the fact that appellant sought employment from

[illegible] to summarize the case [illegible], briefly, to give this [illegible] in a nutshell, and that it did not matter [illegible] whether it went to a charity under the will or under the deed; that even if there were a conflict in interest, that conflict would not prevent appellant from [illegible] for services performed in good faith until his employment ceased in April, 1917, before the [illegible] had [illegible] the acts complained of were done by appellant in carrying out the [illegible] instructions to him; that the claim of incompetency must of necessity be founded upon the belief that appellant at all times thought appellees were going to be unfaithful when such is not the case; that the interest of the estate is paramount to the interest of appellees; that the real test of conflicting interests which deprives an attorney of his fees is whether the attorney is shown to have violated some duty to his client by [illegible] against the client [illegible] from his employment by that particular client; that the appellees seem to think this is their estate and their property, and that the beneficiaries are the objects of their bounty.

In support of these contentions, appellant cites I [illegible] on Attorneys at Law, page 214, section 176, where it is said: "The fact of incompatibility, in and whether the attorney has ever been retained by the party against whom he proposes to appear, but whether his accepting the new retainer will require him, in forwarding the interest of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, or whether he will be called upon in his new relation to use against his former client any knowledge or information acquired through their former connection."

We do not think the law relationship in this case depends upon appellant's having been employed by a former client and the knowledge which he obtained while so employed. The decision is based upon the fact that appellant accept employment from

appellees without disclosing facts which appellees had a right to know, and which, if they had known, might or would have affected appellees' actions in employing appellant as an attorney to handle the estate. Nor many cases are cited laying down the rule under facts similar to these, but we think the law is well settled in that regard.

In Strong vs. International Investment Union, 182 Ill. 97, on page 101, it is said; "Attorneys at law cannot thus accept employment from adverse litigants at the same time and in the same controversy. Nor does it matter that the intentions and motives of the lawyers are honest, as we fully believe them to have been in the present instance. The rule is a rigid one, and designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude an honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to the full extent the rights of the interest which he alone represents." In Fortune vs. English, 226 Ill. 262, it is said; "although all persons are presumed to know the law, it is undoubtedly true that where the relation of attorney and client exists, a fraudulent concealment of the cause of action by the attorney may be accomplished by a misrepresentation of the state of law or the legal rules or principles applicable to the facts, knowingly made for the purpose of deceiving the client. While the relation requires a full disclosure by the attorney of all matters within the scope of his employment, it does not require him to volunteer information to his client that his client has a cause of action against him." In People vs. Gerold, 265 Ill. 448, there is a discussion at considerable length of the duties which a lawyer owes to his client.

We think the correct rule applicable to the facts of this case is stated by the appellees in their brief as the first section of the Canons of Ethics of the American Bar Association, adopted August 27, 1908, as follows: "It is the duty of a lawyer at the

time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in his selection of counsel. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests only when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. The obligation to represent a client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." This canon is supported by the following authorities: Williams vs. Reed, 3 Mason (U. S.) 405; I American and English Ency. of Law, Ist Edition, 958; Weeks on Attorneys, paragraph 260; 6 C. J. 682, note 86; Carter's Ethics of Legal Profession, pages 47 and 48.

Upon the death of Mrs. Huling, the appellees became executors and trustees under her will. This will was executed six months and twenty-one days prior to her death, and the codicil attached to it was executed only twenty-six days before her death. The deed under which appellant claims title to the homestead was executed almost six years before her death. We must assume from these dates that the will expresses the last intention of the testatrix. In fact there is no question as to its legal execution by the testatrix, while the conditions under which the deed was delivered depend entirely upon the testimony of the appellant. By this will the appellees were charged with the duty of administering this estate according to the terms therein specified. In so doing, it was necessary that they have legal assistance. They sought to employ appellant. In so doing, they had a right to expect of him that he would disclose to them all of the facts and circumstances relative to his prior relations to Mrs. Huling, and fully informed them of any interest which he might have in connection with the

ties of testator to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests only when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. The obligation to represent a client with undivided fidelity and not to divulge his secrets or confidences, forbids also the subsequent acceptance of employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." This canon is approved by the Illinois authorities. Hilliker v. Reed, 3 Mason (U. S.) 405; 1 American and British Decs. of Law, 1st Edition, 358; Weeks on Attorneys, paragraph 280; 6 C. J. 682, note 86; Carter's Bibles of Legal Ethics, pages 47 and 48.

Upon the death of Mrs. Ewing, the appellees became executors and trustees under her will. Her will was executed six months and twenty-one days prior to her death, and the codicil attached to it was executed only twenty-six days before her death. The deed under which appellant claims title to the homestead was executed almost six years before her death. We must assume from these dates that the will expresses the last intention of the testatrix. In fact there is no question as to its legal execution by the testatrix, while the conditions under which the deed was delivered depend entirely on the testimony of the appellant. By this will the appellees were appointed executors of the estate of the testatrix according to the terms therein specified. In so doing, it was necessary that they have legal assistance. They were not to employ appellant. In so doing, they had a right to assume or think that he would disclose to them all of the facts and circumstances relative to his prior relations to Mrs. Ewing, and fully inform them of any interest which he might have in connection with the

matter in controversy which might influence appellees in the selection of an attorney. This he failed to do. By his silence, appellees had a right to presume that there were no facts and circumstances which might interfere in any degree with his exclusive devotion to the cause confided to him. If appellees had known of the facts which appellant concealed from them they would probably never have employed him to represent them in carrying out the will, for the reason that they would have known that at any time he might attempt to assume a position which was contrary to the will and hostile to its provisions. This was true notwithstanding the fact that the will and the deed emanated from the same person. Not knowing the facts concealed by appellant, they employed him in good faith. On the other hand, appellant should have fully informed appellees of the secret trust and the deed held by him, or, if he did not care so to do, he should not have accepted the employment. He accepted the employment with the full knowledge that he possessed alleged authority and information which was unknown to appellees and which might at any time make his interests antagonistic to those of the appellees. This concealment did not take place after most of the fees had been earned as claimed by appellant, but it took place from the very inception of his employment and must have related to his every act as attorney for appellees.

With knowledge of this concealment, he prepared an inventory, listing the homestead as belonging to the estate; he prepared an order of the court finding the title and possession of the homestead to be vested in the appellees; he prepared a petition by appellees which he filed in the county court asking leave to rent the homestead, and prepared an order of the court granting the prayer of the petitioners; he prepared reports showing expenditures by the appellees of money on account of the homestead, and prepared orders of the county court approving those expenditures; he made reports to the court of unsuccessful attempts that had been made by appellees to sell the homestead, and he advised appellees to offer the homestead for sale in August, 1915, and prepared

lection of an attorney. This he failed to do. By his silence, appellee had a right to presume that there were no facts and circumstances which might interfere in any degree with his exclusive devotion to the cause confided to him. If appellee had known of the facts which appellant concealed from them they would probably never have employed him to represent them in carrying out the will, for the reason that they would have known that at any time he might attempt to assume a position which was contrary to the will and hostile to its provisions. This was true notwithstanding the fact that the will and the deed emanated from the same person. Not knowing the facts concealed by appellant, they employed him in good faith. On the other hand, appellant should have fully informed appellees of the secret trust and the deed held by him, or, if he did not care to do, he should not have accepted the employment. He accepted the employment with the full knowledge that he concealed alleged authority and information which was unknown to appellees and which might at any time make his interests antagonistic to those of the appellees.

This concealment did not take place either most of the fees had been earned as claimed by appellant, but it took place from the very inception of his employment and must have related to his every act as attorney for appellees.

With knowledge of this concealment, he procured an inventory, listing the homestead as belonging to the estate; he procured an order of the court finding the title and possession of the homestead stead to be vested in the appellees; he procured a petition by appellees which he filed in the county court asking leave to rent the homestead, and procured an order of the court granting the prayer of the petitioners; he procured reports showing expenditures by the appellees of money on account of the homestead, and procured orders of the county court approving these expenditures; he made reports to the court of unnecessary expenses that had been made by appellees to sell the homestead, and he advised appellees to sell the homestead for sale in August 1918, and procured

notices of such sale and caused them to be published in the newspapers; he received inquiries with reference to the rental and purchase of the homestead, and referred the persons to the appellees. In October, 1918, a barn on the homestead was sold by the trustees and the money was received by them with the knowledge of the appellant and the approval of the county court. In December, 1918, appellees rented the premises with the knowledge and consent of the appellant and received the rent. On Saturday, September 20, 1919, after the office of the recorder of deeds had been closed for the day, appellant went to the office with the recorder, by appointment with the recorder, and filed for record the deed from Mrs. Euling to him. This deed was immediately entered upon the records. The handwriting in the body of the deed was that of the appellant, and across the face of the deed and diagonally across the description of the real estate in the body of the deed was written the word "cancelled", which word had been erased, and this erasure had been made across the signature of the grantor on the face of the deed. This was the condition of the deed when it was introduced in evidence in this case.

It appears from this evidence that there was one continous line of concealment, beginning with the concealment of the deed to appellant from Mrs. Euling and leading right down to the deed to the Young Womens's Christian Association, in a lawsuit between the appellant and appellees in which the deed was set aside. As a consequence of this concealment, the relations of appellant and appellees resulted in a lawsuit in which appellees could not avail themselves of the services of appellant, and they were compelled to employ outside counsel to preserve their rights. The Supreme Court held the deed was invalid for the reason that it had never been delivered. As a lawyer, appellant should have known this fact, and simply because the county court allowed more fees to appellees than appellant thought should have been allowed, he was not justified in taking action antagonistic to the appellees. It is stated by appellant that appellees were merely representing

notices of such sale and caused them to be published in the newspapers; he received inquiries with reference to the terms and purchase of the homestead, and referred the persons to the appellees. In October, 1918, a bank on the homestead was sold by the appellees and the money was received by them with the knowledge of the appellant and the approval of the county court. In December, 1918, appellees refused the premises with the exclusion and consent of the appellant and received the rent. On January, February 1, 1919, after the delivery of the deed, it was not been placed for the day, appellant went to the office of the recorder, in Kennebunk, the secretary, and filed the record the deed from him. Nothing on was. This was the instrument signed upon the counter. The knowledge in the body of the deed was that of the appellant, and across the face of the deed was illegally across the description of the real estate in the body of the deed was written the word "cancelled", which word had been erased, and this erasure had been made across the signature of the grantor on the face of the deed. It is not the condition of the deed when it was introduced in evidence in this case.

It appears from this evidence that there was one continuous line of concealment, beginning with the concealment of the deed to appellant from Mrs. Hilton and leading right down to the deed to the County Women's Christian Association, in a lawsuit between the appellant and appellees in which the deed was set aside. As a consequence of this concealment, the relations of appellant and appellees resulted in a lawsuit in which appellees could not avail themselves of the services of appellant, and they were compelled to employ outside counsel to preserve their rights. The Supreme Court held the deed was invalid for the reason that it had never been delivered. As a lawyer, appellant should have known this fact, and simply because the county court allowed more fees to appellees than appellant thought should have been allowed, he was not justified in taking action antagonistic to the appellees.

the estate, yet the evidence shows the suit in this case is against them as individuals and not against them as executors and trustees. It was their duty to resist the attempt of appellant to place this deed upon record and convey this property in a way different from that provided in the will, and for that reason their interests were hostile and in conflict with those of the appellant. We do not see how it can be successfully contended that appellant is entitled to receive compensation from the time the will was probated until 1917, covering a period of three years, after which he claims he no longer represented the appellees. There is no evidence that he was ever discharged or ever quit the employment.

We are of the opinion that the court properly directed a verdict against appellant and for that reason judgment will be affirmed.

Judgment affirmed.

the estate, yet the evidence given the jury is this law is applicable to them or ambiguous and not against them in substance and tenor. It was their duty to satisfy the "Ministry of Finance" to place this deed upon record and convey this property in a way different from that provided in the will, and for that reason their interests were mutual and in identical with those of the appellees. We do not see how it can be successfully contended that appellant is entitled to recover compensation from the time the will was probated until 1917, covering a period of three years, after which he claims he no longer represented the appellees. There is no evidence that he was ever discharged or ever quit the employment.

We are of the opinion that the court properly directed a verdict against appellant and for that reason judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

People of the State of
Illinois, ex rel Mildred
Hornung,
appellee,
vs.
Maurice Cofoid,
appellant,

235 I.A. 622

Appeal from the County Court
of La Salle County.

Partlow, J.

Appellant, Maurice Cofoid, was found guilty in the county court of La Salle County of being the father of the bastard child of Mildred Hornung, Judgment was entered against appellant and an appeal was prosecuted to this court.

It is first urged that the verdict is contrary to the evidence. Mildred Hornung was born August 29, 1900, on a farm in Deer Park township, La Salle County. She attended the public school until she reached the eighth grade. She then quit school and after working for several families, about May 21, 1919, began house work in the home of George Cofoid, the father of appellant. At that time appellant was a year or two older than Mildred. They lived about three miles apart. The Cofoid family consisted of George Cofoid, his wife, and their son the appellant, and one hired man all of the time, and two hired men a part of the time. The Cofoid house was a two story building facing north. It had a front and a back stairway. There was a hallway extending north and south on the second floor in the center of the building but it did not extend the entire length of the house. Mildred occupied the southwest room upstairs. The southeast room was used as a store room. Both of these rooms opened into the upper hall. In the northwest corner was a storeroom. The hired man occupied a room in the northeast corner and in this room the back stairs landed. There was no door from the northeast room into the upper hall. In the front of the house between the northwest store room and the room

Appeal from the County Court
of La Salle County.

Appellant, Maurice Gotold, was found guilty in the county court of La Salle County of being the father of the bastard child of Mildred Hormann. Judgment was entered against appellant and an appeal was prosecuted to this court.

It is first urged that the verdict is contrary to the evidence. Mildred Hormann was born August 20, 1920, in a farm in Deer Park township, La Salle County. She attended the public school until she reached the eighth grade. She then left school and began working for several families, about May 1, 1939, began house work in the home of George Gotold, the father of appellant. At that time appellant was a year or two older than Mildred. They lived about three miles apart. The Gotold family consisted of George Gotold, his wife, and their son the appellant, and one hired man all of the time, and two hired men a part of the time. The Gotold house was a two story building facing north. It had a front and a back stairway. There was a hallway extending north and south at the second floor in the center of the building but it did not extend the entire length of the house. Mildred occupied the northwest room upstairs. The northeast room was used as a store room. Both of these rooms opened into the upper hall. In the northwest corner was a storeroom. The hired man occupied a room in the northeast corner and in this room the lower stairs landed. There was no door from the northeast room into the upper hall. In the front of the house between the northwest store room and the room

occupied by the hired man, were the rooms occupied by appellant. This space was divided by a partition extending east and west dividing the space into a north and a south room. There was a door from appellant's room into the upper hall and a door from the northeast room into appellant's room. There was one bed room down stairs in the southwest corner occupied by Mr. and Mrs. Cofoid and it was directly under the room of Mildred.

Mildred testified to several acts of familiarity towards her by appellant beginning in March, 1920, and continuing until July 5, 1921. She testified that in March while the family was away and she was in the house alone, appellant came in, put his arm around her and asked her if she liked him and she told him she did. In April or May, appellant took his mother to a dressmakers in the village of Utica in an automobile. It was after dark and Mrs. Cofoid and Mildred sat in the rear seat and appellant drove. While Mrs. Cofoid was in the dressmaker's house, appellant got into the back seat and put his arms around Mildred and tickled her on the knees and when she told him to stop, he said; "Gee, you are ticklish". When his mother came out he got in the front seat. She testified that similar acts took place in April and May a couple of other times when they went with Mrs. Cofoid to the dressmakers.

On Saturday, July 3rd, Mildred went to her home. On July 4th she went with her parents to Starved Rock to a celebration. They returned home late in the afternoon. On July 5th, she again went to Starved Rock with her parents and she testified that about five o'clock her parents took her to the Cofoid home. She testified that the Cofoids were all away when she reached the house, but they came home about a half hour later. She had supper with the family and went to bed between eight and nine o'clock. About midnight appellant came into her room and got in bed with her and told her not to holler that he would not hurt her. She told him to get out but he would not go. She did not holler because he told her not to. He put his hand over her mouth. She struggled and resisted but he had intercourse with her. She testified that before that

occupied by the hired man, were the rooms occupied by appellant. This space was divided by a partition extending east and west - dividing the space into a north and a south room. There was a door from appellant's room into the upper hall and a door from the northeast room into appellant's room. There was one bed [illegible] Dorothy and it was directly under the room of Mildred.

Mildred testified to several acts of [illegible] towards her by appellant beginning in March, 1930, and continuing until July 8, 1931. She testified that in March while the family was away and she was in the house alone, appellant came in, [illegible] his arm around her and asked her if she liked him and she told him she did. In April or May, appellant took his mother to a [illegible] in the village of Vidor in an automobile. It was after dark and Mr. Dorothy and Mildred met in the front hall and appellant drove. Mrs. Dorothy was in the [illegible]'s house, [illegible] and took the book east and put his arms around Mildred and kissed her on the knees and when she told him to stop, he said: "Ice, you are thirsty". When his mother came out he got in the front seat. She testified that similar acts took place in April and May a couple of other times when they went with Mrs. Dorothy to the [illegible].

On Saturday, July 8th, Mildred went to her home. On July 6th [illegible] went with her parents to Mildred back to a celebration. They returned home late in the afternoon. On July 8th, she again went to [illegible] with her parents and she testified that about five o'clock her parents took her to the Dorothy home. She testified that the Dorothy were all away when she reached the home, but they came home about a half hour later. She had supper with the family and went to bed between eight and nine o'clock. [illegible] appellant came into her room and got in bed with her and told her not to holler that he would not hurt her. [illegible] but he would not go. She did not holler [illegible] not to. He put his hand over her mouth. [illegible] and had intercourse with her. She testified that before this

time she was a virgin. She had just recovered from her monthly flow on July 1st. He hurt her and she bled and soiled the bed clothes. He was with her about two hours and had intercourse with her twice. She testified that the following Monday, Mrs. Cofoid assisted her with the washing and her soiled bed linen was in the wash. She testified the appellant had intercourse with her almost every week thereafter until a few weeks before the baby was born. She discovered she was in a family way about August 1st, but did not tell appellant until about four months later when he promised to marry her.

On April 16th, she got up and assisted with the work but did not eat any breakfast. While the others were eating she lay down on a lounge, began to cry and said she was sick. She was helped to the bed in an adjoining room and told Mrs. Cofoid that she was in a family way. A doctor was called but the baby was born before he arrived. Mrs. Cofoid asked her who was to blame. She replied, "Ask Maurice". Appellant was called but denied the charge. The evidence in chief on behalf of appellee consisted of her testimony.

In defense, appellant testified that he had known Mildred two or three years before she came to his home. He never went with her or paid any attention to her, that he never had indulged in any familiarity with her; had never had intercourse with her; never was in the house with her alone and never was in an automobile alone with her. On July 5th, Mr. and Mrs. Cofoid, appellant and the ~~hirder~~ hired man went to the automobile races at Streator, sixteen miles distant. They returned home about seven o'clock and each testified that Mildred was not there when they reached home; that none of them saw her that evening or until the next forenoon when she returned to the house just before noon.

Appellant testified he had never in his life had intercourse with a woman. Three physicians testified they had examined appellant, that his fraenum did not appear to be ruptured, that no scar appeared thereon; that if the organ had been subjected to great

time she was a virgin. She had just recovered from her monthly flow on July 1st. He kept her and she died and called the bed clothes. He was with her about two hours and had intercourse with her twice. She testified that the following Monday, Mrs. Dorold assisted her with the washing and her soiled bed linen was in the wash. She testified the appellant had intercourse with her almost every week thereafter until a few weeks before the baby was born. She discovered she was in a family way about August 1st, but did not tell appellant until about four months later when he promised to marry her.

On April 15th, she got up and assisted with the work but did not eat any breakfast. While the others were eating she lay down on a lounge, began to cry and told her she was sick. She was helped to the bed in an adjoining room and told Mrs. Dorold that she was in a family way. A doctor was called and the baby was born before he arrived. Mrs. Dorold asked her who was to blame. She replied, "Ask Maurice". Appellant was called but denied the charge. The evidence in chief on behalf of appellee concluded at her testimony.

In defence, appellant testified that he had known Mildred two or three years before she came to his home. He never went with her or paid any attention to her, that he never had indulged in any familiarity with her; had never had intercourse with her; never was in the house with her alone and never was in an automobile alone with her. On July 5th, Mr. and Mrs. Dorold, appellant and the younger hired man went to the automobile races at Syracuse, sixteen miles distant. They returned home about seven o'clock and each testified that Mildred was not there when they reached home; that none of them saw her that evening or until the next forenoon when she returned to the house just before noon.

Appellant testified he had never in his life had intercourse with a woman. Three physicians testified they had examined appellant, that his frenum did not appear to be ruptured, that no scar appeared thereon; that if the organ had been ruptured to reach

pressure or violence that the fraenum would probably have been ruptured and would show a permanent scar; that if Mildred was a virgin and the opening to her private parts was small, the male organ, unless small, would be likely to be subjected to sufficient pressure to rupture the fraenum and cause a scar; that he might have had intercourse provided his organ was small and the woman's privates were large; that the opening into the private parts of a virgin was sometimes large, but usually otherwise; that the size of the opening was not governed by the size of the woman.

The evidence on behalf of appellant shows that in April, after the baby was born, appellant went to the Logan farm near his home and in the presence of Sherwood Logan had a talk with Leonard Myers, the hired man, in which appellant asked Myers what he knew about Mildred and Myers replied that he did not know much and would not say what he knew because they were neighbors; that appellant again went to see Myers, who in the presence of Logan, is alleged to have said that Dan Snell had told him that he (Snell), had had intercourse with Mildred. Appellant testified he went to see Snell who said it was not true.

Dan Snell was called as a witness for appellee and testified that appellant came to see him before the preliminary hearing and asked him if he could tell the name of anyone who had been going around with Mildred and Snell replied that he guessed Dofoid knew more about that than anyone he knew, and Maurice smilled and insisted that Snell attend the preliminary.

Leonard Myers testified he had but one conversation on the Logan farm with appellant about Mildred and that Sherwood Logan was present; that appellant said he was looking for someone who would ~~swar~~ swear that he had something to do with Mildred; that if he (Myers) would swear to it, that appellant would make it right with him. He testified he did not tell appellant that Dan Snell said he had improper relations with Mildred and that Dan Snell never told him he had improper relations with her. Sherwood Logan was not called as a witness by appellant. Leonard Myers and Raymond

presence or evidence that the defendant [illegible] specially in a dark
[illegible] and would show a premeditated act; that if Mildred was
a virgin and the opening to her private parts was small, the male
organ, unless small, would be likely to cause considerable injury
[illegible] to support the testimony that it did not
have had intercourse previous to taking the girl out to her home;
privates were large; that the opening into the private parts of
a virgin was sometimes large, but usually otherwise; that the size
of the opening was not governed by the size of the woman.

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the baby was born, appellant went to the Logan farm near Mis Lore
and in the presence of Sherwood Logan had a talk with Leonard
Myers, the hired man, in which appellant asked Myers what he knew
about Mildred and Myers replied that he did not know much and would
not say what he knew because they were neighbors; that appellant
again went to see Myers, who in the presence of Logan, is alleged
to have said that Ben Snell had told him that he (Snell), had
had intercourse with Mildred. Appellant testified he went to see
Snell who said it was not true.

Ben Snell was called as a witness for appellee and testified
that appellant came to see him before the preliminary hearing, and
asked him if he could tell the name of anyone who had been going
around with Mildred and Snell replied that he guessed nobody knew
more about that than anyone he knew, and Hamilton smiled and
insinuated that Snell attend the preliminary.

Leonard Myers testified he had but one conversation on the
Logan farm with appellant about Mildred and that Sherwood Logan
was present; that appellant said he was looking for someone who
would swear sweep that he had something to do with Mildred; that
if he (Myers) would swear to it, that appellant would make it right
with him. He testified he did not tell appellant that Ben Snell
made to him improper relations with Mildred and that Ben Snell
never told him he had improper relations with her. Sherwood Logan
was not called as a witness by appellant. Leonard Myers and Sherwood

Myers, his brother, both testified that in July, 1921, after the preliminary hearing, they had a conversation with appellant and his father in front of the Cofoid home. The father talked with Leonard on one side of the car and appellant talked with Raymond on the other side. Raymond testified that appellant offered him $200 to testify that Raymond had had improper relations with Mildred. The testimony of appellant relative to this incident is in considerable confusion to say the least.

Mr. and Mrs. Henry Ott, who lived in the neighborhood and for whom Mildred worked before she went to appellant's home, testified they had seen Mildred and appellant drive past their house in a car more than once while Mildred worked for appellant's parents.

Ralph Tipton testified that while he was a tenant on the Cofoid farm in April or May, 1920, appellant told him he believed he could have intercourse with Mildred and he would do it if he was not afraid of getting her into trouble. This is denied by appellant.

There are other facts and circumstances in evidence which have some bearing in the decision of the case but we have tried to state the principal facts. Appellant claims that the entire case on behalf of appellee rests upon the uncorroborated evidence of the prosecuting witness; that she is contradicted as to her whereabouts on July 5, by at least three witnesses; that her evidence is untrue, unreasonable, inconsistent; and at variance with her evidence at the preliminary hearing; that she never called her father or mother as witnesses to corroborate her as to when she got back to the Cofoid home on July 5; that the medical testimony offered by appellant was not contradicted and was a complete defense to the case.

We do not consider it necessary to discuss in detail the relative weight which should be given to the various facts in evidence. The most that can be said with reference to the evidence is that it is in hopeless conflict and cannot be reconciled upon

Sgt. Sevely, the Canadian Sgt. in July, 1971, after the preliminary hearing, they had a conversation with appellant and his father in front of the Dorfold home. The father talked with Lamont on one side of the car and appellant talked with Lamont on the other side. Lamont testified that appellant admitted the BMOC is exactly what Lamont had her Tampax relations with appellant. The testimony of appellant relative to this incident is in considerable contradiction to say the least.

Mr. and Mrs. Henry Ott, who lived in the neighborhood and for whom Mildred worked before she went to appellant's home, testified they had seen Mildred and appellant drive past their home in a car more than once while Mildred worked for appellant's parents.

Ralph Tipton testified that while he was a tenant on the Dorfold farm in April or May, 1970, appellant told him he believed he could have intercourse with Mildred and he would do it if he was not afraid of getting her into trouble. This is denied by appellant.

There are other facts and circumstances in evidence which have some bearing in the decision of the case but we have tried to state the principal facts. Appellant claims that the entire case on behalf of appellee rests upon the uncorroborated evidence of the prosecuting witness; that she is contradicted as to her whereabouts on July 5, by at least three witnesses; that her evidence is untrue, unreasonable, incomprehensible; and at variance with her evidence at the preliminary hearing; that she never called her father or mother as witnesses to corroborate her as to when she got back to the Dorfold home on July 5; that the medical testimony offered by appellant was not contradicted and was a complete defense to the case.

We do not consider it necessary to discuss in detail the relative weight which should be given to the various facts in evidence. The most that can be said with reference to the evidence is that it is in hopelessly conflict and cannot be reconciled upon

any reasonable theory. We have read the evidence with great care and considered every fact urged by appellant. We do not agree with the contention of appellant that the verdict rests entirely upon the uncorroborated testimony of the prosecuting witness, or that her evidence is so untrue, unreasonable, inconsistent, or at variance with her evidence on the preliminary hearing as to justify a reversal of the judgment. If the jury believed her evidence they were justified in returning a verdict against appellant. If they believed the evidence offered by appellant, they should not have returned the verdict which was returned. The questions at issue were purely questions of fact for the jury to determine. The mere fact that the evidence is in conflict and is contradictory, or that minds might differ as to the sufficiency of the evidence to sustain the verdict, would not justify this court in reversing the judgment. Before this court would be justified in reversing the judgment we must be able to say that the judgment is contrary to the manifest weight of the evidence, otherwise it should be affirmed. McKey vs. Ester, 157 Ill. App. 168; Wickert vs. Crosthwait, 165 Ill. App. 586; Greenwald vs. Weinberg, 174 Ill. App. 439. We do not feel justified in saying that the judgment is contrary to the manifest weight of the evidence, and therefore we cannot reverse the judgment on that ground.

Appellant contends that the court admitted incompetent and prejudicial evidence on behalf of appellee; refused to admit competent evidence offered by appellant; unduly restricted the cross-examination of the prosecuting witness; gave improper instructions on behalf of appellee; refused proper instructions on behalf of appellant; improperly modified instructions offered by appellant, and permitted improper argument to the jury. These complaints are so numerous that it would be impossible within the reasonable limits of an opinion to consider each of them in detail. We have examined them separately, noted what is said in the briefs as to each and do not find any substantial error in any of these respects complained of which would be sufficient to justify a reversal of

any reasonable theory. We have read the evidence with great care and considered every fact urged by appellant. We do not agree with the contention of appellant that the verdict rests entirely upon the [illegible] her evidence is so untrue, unreasonable, inconsistent, or at variance with her evidence on the preliminary hearing, as to justify a reversal of the judgment. If the jury believed her evidence they were justified in returning a verdict against appellant. If they believed the evidence offered by appellant, they should not have returned the verdict [illegible] were purely questions of fact for the jury to determine. The mere fact that the evidence is in conflict and is contradictory, or that minds might differ as to the sufficiency of the evidence to sustain the verdict, would not justify this court in reversing the judgment. Before this court would be justified in reversing the judgment we must be able to say that the judgment is contrary to the manifest weight of the evidence, otherwise it should be affirmed. Mokey vs. Futon, 157 Ill. App. 206; [illegible] We do not feel justified in saying that the judgment is contrary to the manifest weight of the evidence, and therefore we cannot reverse the judgment on that ground.

Appellant contends that the court admitted incompetent and prejudicial evidence on behalf of appellee; refused to admit competent evidence [illegible] appellant; improperly modified instructions offered by appellant, and [illegible] are so numerous that it would be impossible within the reasonable limits of an opinion to consider each of them in detail. We have examined them separately, noted what is said in the briefs as to each and do not find any substantial error in any of these respects complained of which would be sufficient to justify a reversal of

the judgment.

The trial lasted several days. On the evening of December 28, 1922, there was a night session of court which lasted until about ten o'clock. Two of the jurors lived in Streator which is about sixteen miles from Ottawa where the trial was held. The two towns are connected by an interurban railroad and there was a car leaving Ottawa at eleven o'clock P.M. Arthur M. Shay, one of the attorneys for appellee, lived in Streator and traveled back and forth in an automobile. After court adjourned, the court, clerk, assistant state's attorney, and lawyers on both sides were in the court room talking. One of the jurors approached Mr. Shay and asked if the two jurors could ride home with him. Shay asked Lee O'Neil Browne, one of the attorneys for appellant, if he had any objection to the jurors riding home with him. Mr. Browne told Shay that Shay knew he should not make such a request at that time in the presence of the two jurors. Shay said that if Browne objected the two jurors could not ride with him. One of the jurors said the car did not leave until eleven o'clock and they could not get home before that time unless they walked. The jurors did not ride with Shay, but the next morning counsel for appellant asked the court for a continuance on the grounds that they were afraid these jurors would be prejudiced against appellant. The court refused the continuance and this is assigned as error. This incident shows no improper conduct on the part of counsel for appellee. He did not go to the jurors but the jurors came to him. They probably did not understand the impropriety of such a question, but they had no improper intention in seeking a ride home. This incident was in the presence of the trial judge and he apparently saw no harmful result to appellant. On the motion for a new trial both jurors made affidavit. They said they had been acquainted with Mr. Browne, for many years and during all that time had been on friendly terms with him; that neither of them had any ill-feeling towards him because of his refusal to consent to their request; and that the incident did not have any weight with them in the slightest degree in arriving at

the judgment.

The trial lasted several days. On the evening of December 12, 1922, there was a night session of court which lasted until about ten o'clock. Two of the jurors lived in Hresston which is about sixteen miles from Ottawa where the trial was held. The two towns are connected by an interurban railroad and there was a car leaving Ottawa at eleven o'clock P.M. Arthur M. Shay, one of the attorneys for appellee, lived in Hresston and traveled back and forth in an automobile. After early adjournment, one night, Clay, Harlinton state's attorney, and lawyers on both sides were in the court room talking. One of the jurors approached Mr. Shay and asked if the two jurors could ride home with him. Shay asked Mac O'Neil anyone, one of the attorneys for appellant, if he had any objection to the jurors riding home with him. Mr. Downs told Shay that they knew he should not make such a request at that time in the presence of the two jurors. Shay said that if anyone objected the two jurors could not ride with him. One of the jurors said the car did not leave until eleven o'clock and they could not get home before that time. Shay [illegible]

but the next morning counsel for appellant asked the court for a continuance on the ground that they were afraid these jurors would be prejudiced against appellant. The court refused the continuance and this is assigned as error. This incident shows no improper conduct on the part of counsel for appellee. He did not go to the jurors but the jurors came to him. They probably did not understand the impropriety of such a question, but they had no improper intention in seeking a ride home. This incident was in the presence of the trial judge and he apparently saw no harmful result to appellant. On the motion for a new trial both jurors made affidavit. They said they had been acquainted with Mr. Downs, for many years and neither of them had any ill-feeling to erase the business of the to-

[illegible]

their verdict. In this condition of the record the judgment should not be reversed on account of this incident.

Affidavits were filed by counsel for appellant in which they attempted to show that the child was unduly prominent in the court room during the trial; that the court refused to exclude the child but permitted it to remain in the room and around the trial table in the presence of the court, witnesses and jury. It is difficult from these affidavits and the statement of the court appearing in the record, to determine what are the exact facts with reference to what this child did in the court room. It has been held repeatedly that it is not error to refuse to exclude the child from the court room during the trial. Rose vs. People, 81 Ill. App. 128; Benes vs. People, 121 Ill. App. 103; People vs. Moore, 188 Ill. App. 418; People vs. Enke, 214 Ill. App. 224. It is difficult to keep a small child quiet in a court room or to keep it from attracting undue attention. The court apparently attempted to control the actions of this child as far as possible. On at least one occasion he required parties to take the child out of the room because it was unduly noisy, and he admonished them to keep the child as quiet as possible. The record shows that the court in overruling the motion for a new trial stated that he tried to prevent the child from being unduly in evidence and thought he had succeeded in so doing. There was no reversible error in this respect.

The last objection is that the court improperly permitted the jury to return a sealed verdict without any agreement therefor. The case went to the jury about four o'clock on the afternoon of Saturday, December 29, 1922, and the jury retired to their room in the court house. About 10:45 P.M. the jury was taken to a hotel and went to bed. They returned to the jury room the next morning, where they remained until two o'clock P.M., when the verdict was reached. It is set out in the affidavits of counsel for appellant that the court house was cold on that Sunday and the jury suffered from the cold but no serious point seems to be made on account of this fact. When a verdict was reached, the officer in charge

their verdict. In this condition of the record the judgment should not be reversed on account of this incident.

Affidavits were filed by counsel for appellant in which they attempted to show that the child was unruly throughout in the court room during the trial; that the court refused to exclude the child but permitted it to remain in the room and around the trial table in the presence of the court, witnesses and jury. It is difficult from these affidavits and the statement of the court appearing in the record, to determine what are the exact facts with reference to what this child did in the court room. It has been held repeatedly that it is not error to refuse to exclude the child from the court room during the trial. Rose vs. People, 81 Ill. App. 128; Beman vs. People, 121 Ill. App. 108; People vs. Moore, 188 Ill. App. 418; People vs. Hake, 244 Ill. App. 294. It is difficult to keep a small child quite in a court room or to keep it from attracting undue attention. The court apparently attempted to control the actions of this child as far as possible. On at least one occasion he required parties to take the child out of the room because it was unduly noisy, and he admonished them to keep the child as quiet as possible. The record shows that the court in overruling the motion for a new trial stated that he tried to prevent the child from being unduly in evidence and thought he had succeeded in so doing. There was no reversible error in this respect.

The last objection is that the court improperly permitted the jury to return a sealed verdict without any agreement therefor. The case went to the jury about four o'clock on the afternoon of Saturday, December 29, 1928, and the jury retired to their room in the court house. About 10:45 P.M. the jury was taken to a hotel and went to bed. They returned to the jury room the next morning, where they remained until two o'clock P.M., when the verdict was rendered. It is set out in the affidavits of counsel for appellant that the court house was cold on that Sunday and the jury suffered from the cold but no cautious point seems to be made on account of this fact. When a verdict was rendered, the officer in charge

called the judge but he did not feel well enough to go to the court house to receive the verdict. The judge instructed the officer to have the jury seal the verdict and deliver it to the clerk which was done. There is a dispute as to whether or not the jury was finally discharged. Appellant contends they were discharged and were paid. The court stated in the record they were only discharged until the further order of the court. The next day, Monday, was New Year's Day, and a new term of court began. There was no court on that day or on the next day. On Wednesday, January 5, at ten o'clock A.M., the court caused the jury to appear in open court. Counsel for appellant objected to receiving the verdict on the ground that there was no agreement for a sealed verdict; that the jury was discharged without returning a verdict; that the term of court at which the case was tried had adjourned and another term had begun before the verdict was received. The court overruled the objections. The seal on the verdict was then broken and it was read in the presence of the jury. They were asked if it was their verdict and replied that it was. There is no merit in any of these contentions made by appellant with reference to this verdict. It was not error for the jury to return a sealed verdict even though there had been no agreement therefor unless appellant was in some way injured thereby. Mains vs. Cosner, 62 Ill. 465; Chicago vs. Langlass, 66 Ill. 361; C.C.C. & St. L. Ry. Co. vs. Monaghan, 140 Ill. 474; St. Louis, Vandalia & St. Louis Ry. Co. vs. Faitz, 19 Ill. App. 85; Grace & Hyde Co. vs. Sanborn, 124 Ill. App. 473. Nor was it error to seal the verdict even though there was no consent of the parties and no leave of court therefor. DeHaven vs. United States Brewing Co., 154 Ill. App. 126. The separation of the jury after sealing their verdict did not prevent appellant from polling the jury and the court had the authority to recall the jury after they had separated. Wilcox vs. International Harvester Co., 278 Ill. 465. The verdict returned into open court was the same verdict which the jury signed and

ified the judge but he did not feel well enough to go to the court house to receive the verdict. The judge instructed the officer to have the jury seal the verdict and deliver it to the clerk which was done. There is a dispute as to whether or not the jury was finally discharged. Appellant contends they were discharged and were paid. The court stated in the record they were only discharged until the further order of the court. The next day, Monday, was New Year's Day, and a new term of court began. There was no court on that day or on the next day. On Wednesday, January 3, at ten o'clock A.M., the court caused the jury to appear in open court. Counsel for appellant objected to receiving the verdict on the ground that there was no agreement for a sealed verdict; that the jury had discharged without returning a verdict; that the term of court at which the case was tried had expired and another term had begun before the verdict was received. The court overruled the objections. The seal on the verdict was then broken and it was read in the presence of the jury. They were asked if it was their verdict and replied that it was. There is no merit in any of these contentions made by appellant with reference to this verdict. It was not error for the jury to return a sealed verdict even though there had been no agreement therefor unless appellant was in some way injured thereby. Mahn vs. Jensen, 61 Ill. 465; Chicago vs. Hempleman, 66 Ill. 304; C.B.&Q. R.R. Co. vs. [illegible]; [illegible] vs. [illegible], 66 Ill. [illegible]; [illegible] vs. [illegible]; [illegible] Co. vs. Yates, 19 Ill. App. 89; Moore v. Ryde co. vs. Lundgren, 144 Ill. App. 474. Nor was it error to seal the verdict even though there was no consent of the parties and no leave of court therefor. Bachman vs. United States Brewing Co., 182 Ill. App. 189. The separation of the jury after making their verdict did not prevent appellant from polling the jury and the court had the authority to recall the jury after they had separated. Milner vs. Intermediate Accelerator Co., 190 Ill. 486. The verdict not made into open court was the same verdict which the jury signed and

sealed before they separated. They were asked if it was their verdict and replied that it was. Appellant did not ask to have the jury polled. All of appellant's rights were preserved and he was not injured by reason of a sealed verdict having been returned.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Aug. in the year of our Lord one thousand nine hundred and twenty four,

Justus L. Johnson

Clerk of the Appellate Court.

3993a

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

resent--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State
of Illinois,
Deft. in error,
vs.
Agnes Kroll,
Pltf. in error,

Error to the County Court
of Lake County.

Partlow, J.

An information of ten counts was filed in the county court of Lake county against plaintiff in error, Agnes Kroll and her son, Walter Kroll, charging violations of the prohibition law. The first seven counts charge the unlawful selling of intoxicating liquor, the eighth charges the unlawful possession, and the ninth charges the unlawful furnishing of intoxicating liquor. There was a trial by jury, and a verdict finding the defendant, Walter Kroll, not guilty, and finding plaintiff in error guilty under the first count. She was sentenced to pay a fine of $200 and to be imprisoned in the county jail for 90 days. A writ of error has been prosecuted from this court to review the judgment.

It is first urged that the verdict is against the weight of the evidence. The evidence shows that plaintiff in error, with her two sons, Walter and Victor, lives at the northeast corner of Jackson and Fourteenth Stredts, in North Chicago, Lake county, in a two story brick building which faces south. There were four rooms on the lower floor. In the front room there was a counter, a bar, pool tables, and soft drinks were there sold. There was a kitchen, bedroom and pantry in the rear. In December, 1922, C. A. Brune, a constable of Lake county, who was in the employ of the state's attorney, in company with Forrest Copas and Mr. Blackwell, went to the premises with a search warrant. They went into the front room through the west side door. Five men were sitting in the room eating lunch. Plaintiff in error was

The People of the State
of Illinois,
Def. in Error,

-v-

James Kroll,
Plff. in error,

Error to the County Court
of Lake County.

Martlow, J.

An information of ten counts was filed in the county court of Lake county against plaintiff in error, James Kroll and Joe Ban, Walter Kroll, charging violations of the prohibition law. The first seven counts charge the unlawful selling of intoxicating liquor, the eighth charges the unlawful possession, and the ninth charges the unlawful manufacturing of intoxicating liquor. There was a trial by jury, and a verdict finding the defendant, Walter Kroll, not guilty, and finding plaintiff in error guilty under the first count. He was sentenced to pay a fine of $500 and to be imprisoned in the county jail for 90 days. A writ of error has been prosecuted from this court to review the judgment.

It is first urged that the verdict is against the weight of the evidence. The evidence shows that plaintiff in error, with Joe two sons, Walter and Victor, lived at the northeast corner of Isabella and Pennsylvania streets, in Zion, Lake county, in a two story brick building which faces south. There were four rooms on the lower floor. In the front room there was a counter, a bar, pool table, and [illegible]. There was a kitchen, bedroom and pantry in the rear. In December, 1923, O. A. Brame, a constable of Lake county, who was in the employ of the state's attorney, in company with [illegible], went to the premises with a search warrant. They went into the front room through the west side door. There were sitting in the room eating lunch. Plaintiff in error was

coming out of the kitchen. She was told by Brune that he had a search warrant. He testified she turned and ran back into the kitchen followed by Brune. He found some liquor on top of the sink and a glass with a broken bottom. Plaintiff in error poured some coffee into the sink and tried to rub the liquor into the sink with her hand. She also spilled some colored alcohol into the sink. On January 26, 1923, these three men again visited the premises with a search warrant. Three men were in the front room, and plaintiff in error was in the back room. Walter Kroll was behind the bar. They searched the three men and in the pocket of Lester Swanton found a pint bottle half full of alcohol. Just prior to this time Swanton had been searched at the police station in Waukegan and no alcohol was found in his possession. He was then released and went directly to the place of business of plaintiff in error. The officers followed him. He stopped at no other place and had no other opportunity to get liquor. The officers entered plaintiff in error's place about five minutes after Swanton entered and the liquor was found on his person. Henry Gerkin testified he was in plaintiff in error's place about four months before the trial with Frank Zimmers, that Zimmers went into the kitchen and when he came out he gave the witness a drink of liquor. On another occasion, Gerkin testified he handed Walter Kroll a bottle and asked him to fill it and it was filled with moonshine, and the witness paid $2.00 for it and took it home. George K. Garrity testified he had been in plaintiff in error's place with Zimmers and when they came out Zimmers had three pint bottles of liquor. Zimmers testified he was in plaintiff in error's place on January 21, 1923. Plaintiff in error was the only one present, the witness bought two pints of intoxicating liquor from her and paid $2.00 a pint for it. The next day he was there again and purchased three pints of intoxicating liquor of Walter Kroll. On another occasion, prior to January 21, he purchased some moonshine and paid $2.00 a pint for it but he was not positive who sold it. On another

walking out of the kitchen. She was told by Byrne that he had a search warrant. He testified she turned and ran back into the kitchen followed by Byrne. He found some liquor on top of the pump and a glass with a brown bottom. Plaintiff in error poured some coffee into the glass and tried to use the liquor into the glass with her hand. She also spilled some colored alcohol into the glass. On January 26, 1922, these three men again visited the premises with a search warrant. Three men were in the front room, when plaintiff in error was in the back room. Walter Krull was standing the bar. They searched the three men and in the pocket of Walter Swanson found a pint bottle half full of alcohol. That point to this time Swanson had been searched at the police station in Chicago and no alcohol was found in his possession. He was - then released and was virtually in the place of business at plaintiff in error. The officers followed him. He stopped at no other place and had no other opportunity to get liquor. The officers searched plaintiff in error's place about five minutes after Swanson searched and the liquor was found on his person. Young Swanson testified he was in plaintiff in error's place about four months before the trial with Frank Simmons, that Simmons went into the kitchen and when he came out he had a bottle of liquor. On another occasion, Swanson testified he handed Walter Krull a bottle and asked him to fill it and it was filled with something, and the witness paid $3.00 for it and took it home. George E. Lasity testified he had been in plaintiff in error's place with Simmons and when they came out Simmons had three pint bottles of liquor. Simmons testified he was in plaintiff in error's place on January 21, 1922. Plaintiff in error was the only one present, the witness bought two pints of intoxicating liquor from her and paid $3.00 a pint for it. The next day he was there again and purchased three pints of intoxicating liquor of Walter Krull. On another occasion, prior to January 21, he purchased some something and paid $3.00 a pint for it but he was not positive who sold it. On another

occasion he testified he purchased liquor, but was not sure which one sold it. This witness was arrested on leaving plaintiff in error's place on the last visit by the chief of police who found him in possession of the intoxicating liquor which he said he had purchased in that place. The two sons deny they sold Swanton intoxicating liquor, or that they ever sold or had any in their possession. Mrs. Frank Duzik testified she saw Simmers on January 22, near the Kroll building and plaintiff in error was chasing him away with a broom. Plaintiff in error testified that Simmers was at her place on January 21 and 22, he came inside of the building and she chased him out with a broom and said, "Get away from here, I ain't got nothing." She denied she sold intoxicating liquor to any of the witnesses, or had any in her possession. Lester Swanton testified he was in plaintiff in error's place when, Brune, Copas and Blackwell were there. They took a bottle of liquor from him and he told them he paid $2.00 for it and got it at Wheeling. This evidence was sufficient to sustain the conviction and it established the guilt of the plaintiff in error beyond a reasonable doubt.

Complaint is made by plaintiff in error that the court improperly limited the cross-examination of witnesses called on behalf of defendant in error, and several specific instances are called to our attention where it is claimed error was committed in this respect. It will be impossible and unnecessary to consider each of these instances in detail. It is a well known rule of law and it is unnecessary to cite authority to sustain it that the scope of the cross-examination is limited by the examination in chief. Only such subjects as were testified to on direct examination are subject to cross-examination. This rule was not observed by counsel for plaintiff in error. There was a constant attempt to cross-examine several of the witnesses on subjects which were not covered by the direct examination. For example, Brune on direct examination testified to the visits by him in December, 1922, and on January 26, 1923, and what took place on those occasions, together with a few other facts not here stated. On cross-examination counsel for

plaintiff in error sought to interrogate him about Zimmers being drunk just before the trial and of attempts made to get him sober so he could testify in the case. Four pages of the abstract are taken up with questions which refer to these matters which were not properly the subject of cross-examination. No attempt was made in any of them to lay the foundation for impeachment. The court properly sustained objections to every question along these lines, and yet counsel persisted in asking questions which were not properly the subject for cross-examination. This is true with almost every point complained of by plaintiff in error. The court was apparently very lenient in this respect, and probably would have been justified in taking summary measures to put an end to this method of procedure. Rule 16 of this court provides that the party bringing a cause to this court, shall file a printed abstract or abridgment of the record. The evidence shall be given in narrative form so as to clearly present its substance, but questions and answers may be given when necessary to present alleged errors. The purpose of this rule is to enable this court from the abstract to fully determine all questions presented for review. Counsel for plaintiff in error did not comply with this rule in many instances. For example, on the cross-examination of Zimmers, counsel for plaintiff in error sought to interrogate him with reference to his intoxication on the day of the trial, about his being in the custody of officers who attempted to sober him up, and with reference to certain conversations he was supposed to have had with counsel for plaintiff in error in the rear of the court room just prior to the trial. Over six pages of the abstract were taken up with these questions. From these pages it would appear that the court sustained objections to almost every question asked along those lines. Defendant in error has filed a supplementary abstract which shows that all proper questions were permitted to be answered. If we were to depend upon the abstract prepared by plaintiff in error, we might have been misled into serious error as to what actually

plaintiff in error sought to interrogate him about statements been made just before the trial and of attempts made to get him before the grand jury in the case. Long pages of the matters are taken up with questions which refer to these matters which were not properly the subject of cross-examination. No attempt was made in any of them to lay the foundation for impeachment. The court properly sustained objections to every question also. There, and yet counsel persisted in asking questions which were improperly the subject for cross-examination. This is true with almost every point complained of by plaintiff in error. The court was apparently very lenient in this respect, and probably might have been justified in taking summary measures to put an end to this method of procedure. Rule 16 of this court provides that the party filing a case in 30 days, shall file a printed abstract of the record. The evidence shall be given in narrative form so as to clearly present its substance, but questions and answers may be given when necessary to present alleged errors. The purpose of this rule is to enable this court from the abstract to fully determine all questions presented for review. Counsel for plaintiff in error did not comply with this rule in many instances. For example, on the cross-examination of witness, counsel for plaintiff in error sought to interrogate him with reference to his information on the day of the trial, about his being in the custody of officers and attempted to cover one by, and illustrate to witness the possible inferences to be expected to be had and will counsel for plaintiff in error in the room of the court room just prior to the trial. Over six pages of the abstract were taken up with these questions. From these pages it would appear that the court sustained objections to almost every question asked where there.

Defendant in error has filed a supplementary abstract which shows that all proper questions were permitted to be answered. If we were to depend upon the abstract prepared by plaintiff in error, we might have been misled into serious error as to what actually

took place, but we have been prevented from making this error by our examination of the additional abstract and by going to the record. Under these circumstances, we would be justified in affirming this judgment without the additional labor which could have been prevented if the rules had been complied with. We have, however, read the evidence and considered all of the errors assigned. We find no merit in any of the errors alleged with reference to the limiting of cross-examination.

Complaint is made of two instructions given on behalf of defendant in error. One told the jury it was the duty of the state's attorney to use every legitimate means to secure evidence, and to prosecute a case of this kind; and the other defines a reasonable doubt. The abstract does not show whether either of these instructions were given or refused, so no error can be assigned on either of them. Complaint is also made of an instruction which told the jury that "If the defendant shall through his clerk, agent or servant, sell intoxicating liquor, he shall be equally as guilty as if he had personally sold such liquor." The objection is that there was no evidence on which to base this instruction. There was considerable conflict in the evidence as to who was the owner of these premises. There is evidence tending to show they belong to the plaintiff in error, and there is evidence to show they were operated by her two sons. For this reason, there was evidence on which to base the instruction and it was properly given. Even if there had been no such evidence, the instruction did not cause any injury to the plaintiff in error.

Eight instructions refused and one modified on behalf of the plaintiff in error are assigned as error. Thirty-one instructions were submitted by plaintiff in error. Sixteen were given and the balance refused. Some of the instructions refused stated correct propositions of law, but those given fully informed the jury as to every right of the plaintiff in error. The facts were not complicated and there was no necessity for burdening the court with so many instructions.

that place, but we have been prevented from making this error by the omission of the additional sentence and by going to the trouble. Under these circumstances, we would be justified in affirming this judgment without the additional labor which could have been required if the rules had been complied with. We have, however, read the evidence and considered all of the errors assigned. We find no merit in any of the errors alleged with reference to the finding of fact-questions.

Complaint is made of the instruction given as follows: "Malice is error. One told the jury it was the duty of the defendant's attorney to use every legitimate means to secure evidence, and to prosecute a case of this kind; and the other defines a reasonable doubt. The doctrine does not show whether either of these instructions were given or refused, so no error can be predicated on either of them. Complaint is also made of an instruction which told the jury that "If the defendant shall throw his client, guilt or innocent, well intentioning liquor, he should be equally as guilty as if he had personally sold the liquor." The evidence in this case was so conflicting in the extreme as to who was the owner of these premises. There is evidence tending to show they belong to the plaintiff in error, and there is evidence to show they were rented by her two sons. For this reason, there was evidence on which to base the instruction and it was properly given. Even if there had been no such evidence, the instruction did not cause any injury to the plaintiff in error.

Eight instructions refused and one modified on behalf of the plaintiff in error are assigned as error. Thirty-one instructions were submitted by plaintiff in error. Thirteen were given and the remainder refused. Some of the instructions refused contained propositions of law, but those given fully informed the jury as to every right of the plaintiff in error. The court was not compelled and there was no necessity for submitting the same with so many contractions.

On the motion for a new trial, the plaintiff in error submitted affidavits of newly discovered evidence. The substance of the affidavits was that Joe Morse, on Sunday afternoon, January 21, went with Zimmers to 454 Glencoe Road and bought several bottles of whiskey at the particular time when the witnesses testified Zimmers was in the plaintiff in error's house eighteen miles away. The affidavits show that the affiant knew of the arrest of Zimmers on January 22, but that Zimmers' testimony was not called to his attention until about April 1 and that counsel did not know about it until about April 6. The evidence presented by these affidavits was at best of an impeaching character and was not ground for a new trial. Harter v. People, 204 Ill. 160. No diligence was shown in the presentation of these facts. There must be specific facts stated showing inability to learn of the newly discovered evidence. Even if the evidence had been produced it would merely tend to impeach Zimmers to some extent. It would also impeach the plaintiff in error and Mrs. Duzik, both of whom testified that Zimmers was at the plaintiff in error's house at the times testified to by him. The court, under these circumstances, was not justified in granting a new trial.

Complaint is made that the evidence of Gerkin and Garrity was admitted for an improper purpose; that plaintiff in error on November 5, was taken before a justice of the peace and pleaded guilty to violating the prohibition law. It is insisted by the plaintiff in error that it was necessary to introduce the record of the justice for the reason that defendant in error persisted in offering evidence of violation prior to November 6; that plaintiff in error moved to exclude all evidence of violations prior to November 6, and the motion was overruled. The objection to the record of the proceeding before the justice is without merit for the reason the plaintiff in error offered this testimony and presented it to the jury. Defendant in error agreed to exclude the evidence prior to November 6, but plaintiff in error refused the offer unless it

applied to all of the evidence of these witnesses. Plaintiff in error may have been entitled to have the evidence prior to November 6 excluded, but on account of her refusal to accept the offer no error can be sustained on that ground.

Complaint is made that the court improperly limited the time of argument to thirty minutes, when the plaintiff in error wanted forty-five minutes. It appears that some important statements and conversation between counsel and the court upon this question were omitted from the abstract, and for this reason we will not consider the question except to say that no error was committed in this respect.

During the argument by defendant in error, plaintiff in error objected to the statement that Zimmers purchased liquor from one of the boys who was in the employ of, or who was working for his mother. Plaintiff in error contends that there was no evidence to this effect, but that there was evidence to the contrary. Counsel for plaintiff in error in his argument said that Zimmers was peddling booze in Highland Park at the time he was arrested. An objection was sustained to this argument. There were various other statements about Zimmers having been taken to the state's attorney's office. An objection was made but the court merely ordered counsel to confine himself to the testimony. The plaintiff in error insists that on account of this improper argument she was prejudiced. The entire argument on both sides does not appear in the abstract, but from what does appear, it is clear that improper argument was not limited to one side. For example, counsel for plaintiff in error said, "There is no reason in the world why the jury should be harsh in this case in view of the fact that persons enacting this law have their cellars full of whiskey, and the state's attorney and other people have liquor in their basements". "This man was arrested by police officers who drank from this bottle, this bottle was full when seized and is no partly empty." Counsel on both sides should confine themselves to proper

argument and should not discuss questions which are not in evidence. We are not diposed to reverse a case for improper argument on one side, where it appears there was improper argument on both sides.

Plaintiff in error insists that the court improperly restricted plaintiff in error in the examination of jurors before they were sworn. The error complained of, if there was one, was not sufficient to require a reversal of the judgment.

We find no reversible error and the judgment is affirmed. The cost of the additional abstract will be taxed against the plaintiff in error.

Judgment affirmed.

argument and should not discuss questions which are not in evidence.
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side, where it appears there was improper argument on both sides.

Plaintiff in error insists that the court improperly restricted
laintiff in error in the examination of jurors before they were
worn. The error complained of, if there was one, was not suffi-
cient to require a reversal of the judgment.

We find no reversible error and the judgment is affirmed.

The work of the additional abstract will be taxed against the
laintiff in error.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

3994a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7316

J. B. Hite, Appellee, vs. Albert Monks, Appellant.	)	Appeal from the County Court of Winnebago County.

Partlow, J.

Appellee, J. B. Hite, recovered a judgment for $107.25 in the county court of Winnebago county against appellant, Albert Monks, on account of damages to an automobile, and this appeal was prosecuted.

It is conceded that appellant was guilty of negligence but it is insisted that the trial court entertained the wrong theory of damages, and that the judgment should be reversed or a remittitur entered.

The evidence shows that on November 25, 1922, the day of the accident, appellee was the owner of a Buick automobile, eight years old. It was standing at the curb on Harlem Avenue in the city of Rockford and appellee and a man by the name of Lane were sitting in the car. Appellant was driving his automobile along the same street. When he came to the place where appellee's car was standing, a third automobile crowded appellant's car so that it struck the left front wheel of appellee's car and damaged it. The damages were $5.00 to straighten the front axle; $10.00 for labor in making the repairs ; $18.00 for a new front wheel and $6.25 for labor on the same; and $8.00 for other parts, making a total of $37.25. In addition to these items the evidence shows that the frame of appellee's car was bent and it would cost from $50 to $70 to straighten it. Over the last item the most of the dispute in this case arises for the reason that $70 was allowed for making repairs and the evidence shows the repairs were never made and appellant contends it was not necessary for them to be made. It is admitted that the frame was sprung or bent and the evidence

Appeal from the County Court
of Hammonds County.

Appellee, C.

Appellee, C. B. Mite, recovered a judgment for $107.85 in the county court of Hammonds County against appellant, Albert Monks, on account of damages to an automobile, and this appeal has resulted.

It is conceded that appellant was guilty of negligence but it is insisted that the trial court instructed the jury theory of damages, and that the judgment should be reversed or a modification made.

The evidence shows that on January 24, 1927, the day of the accident, appellee had the owner of a Ford automobile, eight years old. It was standing at the curb on Jackson Avenue in the city of Hammonds and appellee had, by the aid of the same were sitting in the car. Appellant was driving his car along the same street. When he came to the place where appellee's car was standing, a child suddenly ran across appellant's car so that it struck the left front wheel of appellee's car and damaged it. The damages were $5.00 to straighten the front axle; $10.00 for labor in making the repairs; $18.00 for a new fr ny wheel and $5.50 for labor on the same; and $5.00 for other parts, making a total of $37.50. In addition to these items the evidence shows that the frame of appellee's car was bent and it would cost from $50 to $70 to straighten it. Over the last item the most of the diverse in this case exists for the reason that $70 was allowed for making repairs and the evidence tends to show that the car is in good and efficient condition if not necessarily for that it is worth. It is admitted that the frame not damaged at least but the evidence

shows this might interfere with steering the car. In support of his contention that repairs, which are not made are not a subject of recovery, appellant cites Travis vs. Pierson, 43 Ill. App. 579, where it was held that the innocent party is entitled to recover what is reasonably necessary for him to pay and he does pay in order to repair the damage done." In Lathan vs. C. C.C. & St. L. Ry. Co., 164 Ill. App. 559, it was held that when personal property has been injured by the negligence of another and can be repaired, the proper measure of damages is the cost of repairs. *** If the property cannot be repaired, then the measure of damages is the difference between the market value of the property before the injury, and the value of the wreckage." To the same effect is Crossen vs. Chicago & Joliet Electric Ry., 158 Ill. App. 42; McDonnell vs. Lake Erie & Western Ry., 208 Ill. App. 442. There is evidence tending to show that it was necessary to straighten the frame in order to properly steer the car. Whether or not it was necessary to straighten the frame was a question of fact for the jury and we would not be justified in disturbing the finding on this point unless it was clearly against the weight of evidence which we do not feel justified in saying. If it was necessary to straighten the frame, there is ample evidence to sustain the amount allowed for that work. Complaint is made of the evidence relative to the cost of a new front wheel and the cost of straightening the axle but we do not think there is any merit in either of these complaints.

A. L. Hutchins, proprietor of the Buick garage, testified that he remembered sending out a statement itemizing the repairs made and that the paper which was handed to him on the witness stand looked like a copy of that statement. Appellant asked him if the statement was to the effect that the car was put in first class condition. An objection was sustained to this question and this ruling is assigned as error. The statement handed to the witness was in writing and spoke for itself. What it contained was not the proper subject of parole evidence

[illegible]

[illegible] of recovery, appellant cites Davis vs. Hixson, 18 Ill. App. 499, where it was held that the innocent party is entitled to recover what is reasonably necessary for him to pay and he does pay in order to repair the damage done." In Patten vs. C.O. & Ry. C. Ry. Co., 184 Ill. App. 580, it was held that when personal property has been injured by the negligence of another and can be repaired, the proper measure of damages is the cost of repairs. "If the property cannot be repaired, then the measure of damages is the difference between the market value of the property before the injury, and the value of the wreckage." To the same effect is Crossen vs. Chicago & Joliet Electric Ry., 186 Ill. App. 48; McDonnell vs. Duke City & Kankakee Ry., 208 Ill. App. 448. There is evidence tending to show that it was necessary to straighten the frame in order to properly steer the car. Whether or not it was necessary to straighten the frame was a question of fact for the jury and we would not be justified in disturbing the finding on this point unless it was clearly against the weight of evidence which we do not feel justified in saying. If it was necessary to straighten the frame, there is ample evidence to sustain the amount allowed for that work. Complaint is made of the evidence relative to the cost of a new frame and the [illegible] the [illegible] but we do not think there is any merit in either of these objections.

A. E. Hotchins, proprietor of the Union garage, testified that he remembered sending out a statement identifying the repairs made and that the paper which was handed to him on the witness stand looked like a copy of that statement. Appellant cross-examined him if the statement was to the effect that the car was in first class condition. An objection was sustained to this question and this ruling is assigned as error. The statement handed to the witness was in writing and ready for use. If it contained was not the proper subject of verbal evidence

and the objection was properly sustained.

Complaint is made of two instructions given on behalf of the appellee. We do not think either one of them is subject to the criticism made against it.

The judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct. 8, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7319 Ag. 18.

235 I.A. 622

The People of the State
of Illinois,
Defendant in error,
vs.
William Wallace,
Plaintiff in error,

Error to the county court
of Warren County.

Partlow, J.

Plaintiff in error, William Wallace, was found guilty in the county court of Warren county of selling intoxicating liquor under the second count, and of the unlawful possession of intoxicating liquor under the third count of an information. He was sentenced to pay a fine of $150 on each count and to be imprisoned in the county jail for three months, under the second count, and a writ of error has been prosecuted from this court.

It is first urged that the verdict is contrary to the evidence. The evidence shows that the state's attorney of Warren county entered into a contract with the Mooney Detective Agency of Chicago for the services of two investigators, C. M. Hammond and Sam Goldman, during a Fall Festival held in the city of Monmouth, during September, 1923, to investigate violations of the prohibition law. These investigators were employed upon a weekly salary paid to their employer. Their witness fees claimed in cases in which they testified were to be paid into the county treasury. Their reports were made to their employer who turned them over to the state's attorney. Plaintiff in error was conducting, what he called, a restaurant on South Fifth Avenue, in the city of Monmouth, which was equipped with the usual restaurant fixtures. On Saturday, September 22, 1923, between 10 and 11 o'clock in the forenoon, these two investigators, in company with one Everett Murphy, a colored man, went to the place of business of plaintiff in error. They testified they bought three

Plaintiff in error, William Wallace, was found guilty in the county court of Warren county of selling intoxicating liquor under the second count, and of the unlawful possession of intoxicating liquor under the third count of an information. He was sentenced to pay a fine of $100 on each count and to be imprisoned in the county jail for three months, under the second count, and a writ of error has been prosecuted from this court.

It is first urged that the verdict is contrary to the evidence. The evidence shows that the state's attorney of Warren county entered into a contract with the Money Detective Agency of Chicago for the services of two investigators, C. R. Hammond and Sam Goldman, during a Fall Festival held in the city of Monmouth, during September, 1914, to investigate violations of the prohibition law. These investigators were employed upon a weekly salary paid to their employer. Their witness Sam Goldman in order in which they testified were to be paid into the county treasury. Their reports were made to their employer who turned them over to the state's attorney. Plaintiff in error was commenting, what he called, a restaurant on South Fifth avenue, in the city of Monmouth, which was equipped with the usual restaurant fixtures. On Saturday, September 26, 1914, between 10 and 11 o'clock in the forenoon, these two investigators, in company with one Everett Murphy, a colored man, went to the place of business of plaintiff in error. They testified they bought three

the Appellate Court
of Illinois,

Defendant in error,

vs.

William Wallace,

Plaintiff in error.

Error to the county court
of Warren County.

Hutchins, J.

drinks, and were each given a drink by plaintiff in error, and upon leaving one of them purchased from plaintiff in error a pint of intoxicating liquor. On behalf of plaintiff in error, four witnesses testified they were in plaintiff in error's place when the investigators arrived, and that Murphy was not with them. Some of them testified that both investigators were under the influence of liquor; that the investigators asked for liquor and plaintiff in error told them he was not selling liquor, and even if he was selling liquor, he would not sell it to them because of their condition. It is insisted that the investigators were unable to correctly describe the furnishings of the restaurant, and do not agree where the liquor was kept. For these reasons it is contended that the evidence of the investigators is not reliable and that the state failed to prove, beyond a reasonable doubt, the guilt of the plaintiff in error. It was the province of the jury to determine which witnesses were telling the truth. The plaintiff in error did not testify. If the jury believed the evidence of the investigators, the plaintiff in error was guilty, and if the jury did not believe their testimony, but did believe the four witnesses for the plaintiff in error, he was not guilty. After seeing the witnesses and hearing all of the testimony, the jury saw fit to believe the evidence on behalf of the defendant in error. This court will not set aside a verdict unless it is so palpably against the weight of the evidence as to show that it was the result of passion or prejudice. People vs. Popvich, 295 Ill. 491; People vs. Karpovich, 288 Ill. 268; People v. Matsow, 240 Ill. 612. We cannot say the evidence does not establish the guilt of the plaintiff in error beyond a reasonable doubt.

The third instruction tells the jury that if they believe from the evidence beyond a reasonable doubt that the plaintiff in error, either by himself or his agents or servants, sold intoxicating liquor, then you may find the defendant guilty of unlawful sale of intoxicating liquor. It is contended there was no evidence that the liquor was sold by the agent or servant of the plaintiff in error

trials, and were each given a drink by plaintiff in error, and upon leaving one of them announced from plaintiff in error a pint of intoxicating liquor. On behalf of plaintiff in error, seven witnesses testified they were in plaintiff in error's place when the investigators arrived, and that Murphy was not with them. Some of them testified that both investigators were under the influence of liquor; that the investigators asked for liquor and plaintiff in error told them he was not selling liquor, and even if he was selling liquor, he would not sell it to them because of their condition. It is insisted that the investigators were unable to correctly describe the furnishings of the restaurant, and did not even know the liquor was [illegible]. [illegible] it is contended that the evidence of the investigators is not reliable and that the state failed to prove, beyond a reasonable doubt, the guilt of the plaintiff in error. It was the province of the jury to determine which witnesses were telling the truth. The plaintiff in error did not testify. If the jury believed the evidence of the investigators, the plaintiff in error was guilty, and if the jury did not believe their testimony, but did believe the four witnesses for the plaintiff in error, he was not guilty. After seeing the witnesses and hearing all of the testimony, the jury was fit to believe the evidence on behalf of the defendant in error. This court will not set aside a verdict unless it is so palpably against the weight of the evidence as to show that it was the result of passion or prejudice. People vs. Lopsien, 298 Ill. 491; People vs. Lamprecht, 288 Ill. 358; People v. Tobson, 290 Ill. 218. We cannot say the evidence does not establish the guilt of the plaintiff in error beyond a reasonable doubt.

The third instruction tells the jury that if they believe from the evidence [illegible] in plaintiff in error, either by [illegible] as witnesses, but [illegible] liquor, then you may find the defendants guilty of selling and or intoxicating liquor. It is contended there was no evidence that the liquor was sold by the agent or servant of the plaintiff in error

and for this reason the instruction was erroneous. If the plaintiff in error was guilty, there could be no controversy as to who sold the liquor. The witnesses for the defendant in error testified to only one state of facts. Under those facts plaintiff in error was either guilty or not guilty, and the sale, if made, was by plaintiff in error himself and by no one else. There was no evidence on which to base the language in this instruction complained of, but the jury was not misled thereby and no injury was done the plaintiff in error.

The fourth instruction told the jury it was not necessary for the people to prove the plaintiff in error knowingly and wilfully violated the statute, but all that it was necessary to prove was that he violated the law. Plaintiff in error contends the instruction does not state the law, that it is involved, hard to understand, and calculated to mislead the jury. This instruction means that the plaintiff in error was responsible for the usual and reasonable consequences of his acts and that it was not necessary to prove any intent. A person is always presumed to intend that which he voluntarily and wilfully does, and he must always be presumed to intend the natural consequences of his acts. Crosby v. People, 157 Ill. 325; There was no error in giving the fourth instruction.

The jury found the plaintiff in error guilty as charged in counts two and three without reference to the information. Plaintiff in error contends the verdict must contain either in itself, or by reference to the information, every material element of the crime, and that no element of the crime is embodied in this verdict. ~~There are several answers to this contention. The first one is that it was not raised in the trial court. It is not preserved in the motion for a new trial. A motion in arrest of judgment was made but the record shows it was made after sentence had been pronounced.~~ It is not disputed that an information was filed and that the case was based entirely upon the information. All of the instructions

and for this reason the instruction was erroneous. If the plaintiff in error was guilty, there could be no controversy as to who sold the liquor. The evidence for the defendant in error tendified to only one state of facts. Under these facts plaintiff in error was either guilty or not guilty, and the sale, if made, was by plaintiff in error himself and by no one else. There was no evidence on which to base the language in this instruction complained of, but the jury may not misled thereby and no injury was done the plaintiff in error.

The fourth instruction told the jury it was not necessary for the people to prove the plaintiff in error wrongfully and willfully violated the statute, but all that it was necessary to prove was that he violated the law. Plaintiff in error contends the instruction does not state the law, that it is involved, hard to understand, and calculated to mislead the jury. This instruction means that the plaintiff in error was responsible for the usual and reasonable consequences of his acts and that it was not necessary to prove any intent. A person is always presumed to intend that which is voluntarily and willfully done, and he must always be presumed to intend the natural consequences of his acts. Crosby v. People, 187 Ill. 282. There was no error in giving the fourth instruction.

The jury found the plaintiff in error guilty as charged in counts two and three without reference to the information. Plaintiff in error contends the verdict must contain either in itself, or by reference to the information, every material element of the crime, and that no element of the crime is specified in this verdict. There

[illegible]

is not disputed that an information was filed and that the case was based entirely upon the information. All of the instructions

referred to the information. It is very technical to insist that the jury did not understand what they were doing when they returned a verdict of guilty on counts two and three. No other conclusion can be reached than that they had in mind the counts of the information on which the prosecution was based.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

TATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, o hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in ne above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct, in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct 7, 1924

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

resent--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7328

The Farmers National Bank of Prophetstown,)
Appellant,) 235 I.A. 623
vs.) Appeal from the Circuit
George Trautwein,) Court of Whiteside County.
Appellee,)

Partlow J.

On July 13, 1921, appellant, the Farmers National Bank of Prophetstown, obtained judgment by confession for $4499.22, in the circuit court of Whiteside county, against appellee, George Trautwein, upon a promissory note. Upon motion of appellee supported by affidavits, the judgment was set aside and vacated and leave was granted appellee to plead. Additional counts consisting of the common counts were filed, together with a bill of particulars. Appellee filed the general issue supported by an affidavit denying the execution of the note. A jury was waived, there was a trial by the court, a finding in favor of appellant and judgment was rendered against appellee for $4549.81. An appeal was prosecuted to this court and the judgment was reversed and the cause remanded on the ground that the evidence did not establish a ratification by appellee of the note sued on, and that a right of recovery was not established under the evidence and the law. (228 Ill. App. 356) Upon the case being redocketed in the trial court there was a second trial before the court without a jury, a finding in favor of appellee, and to review the judgment upon the finding an appeal has been prosecuted to this court.

When this case was before us upon the former appeal we stated all of the facts and it will not be necessary to repeat them. We also considered and determined every question raised by that appeal. The law as laid down in that opinion is binding on this court and must be taken as the law of this case in so far as the law is applicable to the facts. People vs. Militzer, 301 Ill. 284; People

The Farmers National Bank of Trophetstown,
Appellant,

vs.

George Trentwein,
Appellee.

APPEAL FROM the Circuit Court of Whiteside County.

Mr. Justice [illegible]:

On July 18, 1921, appellant, the Farmers National Bank of Trophetstown, obtained judgment by confession for $4499.38, in the circuit court of Whiteside county, against appellee, George Trentwein, upon a promissory note. Upon motion of appellee supported by affidavits, the judgment was set aside and vacated and leave was granted appellee to plead. Additional counts consisting of the common counts were filed, together with a bill of particulars. Appellee filed the general issue supported b an affidavit denying the execution of the note. A jury was waived, there was a trial by the court, a finding in favor of appellant and judgment was rendered against appellee for $4499.61. An appeal was prosecuted to this court and the judgment was reversed and the cause remanded on the ground that the evidence did not establish a ratification by appellee of the note sued on, and that a right of recovery was not established under the evidence and the law. (282 Ill. App. 356) Upon the case being redocketed in the trial court there was a second trial before the court without a jury, a finding in favor of appellee, and to review the judgment upon the finding an appeal has been prosecuted to this court.

When this case was before us upon the former appeal we stated all of the facts and it will not be necessary to repeat them. We also considered and determined every question raised by that appeal. The law as laid down in that opinion is binding on this court and must be taken as the law of this case in so far as the law is applicable to the facts. People vs. Mittler, 301 Ill. 384; People

vs. Young, 309 Ill. 27; Morganrath vs. Link, 227 Ill. App. 244. The facts as found in our former opinion are binding upon this appeal except in so far as they are changed by new evidence introduced upon the last trial.

At the time the note in question was signed and delivered by appellee it contained the name of no payee, that space being left blank. We held on the former appeal that it was agreed between the parties that the payee should be the Bank of Prophetstown and that the name of that bank was to be written in the blank space; that on account of the fact that the appellant was made the payee without authority or subsequent ratification by apoellee that there could be no recovery against appellee. Appellant now contends that on the second trial new evidence was introduced which requires us to change our finding on this question.

On the first trial appellee testified that there was no payee in the note at the time it was signed. The space was left blank but it was agreed that the bank of Prophetstown should be the payee. There was practically no other evidence on this point. At the second trial appellee testified substantially as he did on the first trial, but Hugh E. Paddock, who conducted the negotiations for the note with appellee, testified that there were no directions, agreement or instructions as to who the payee should be. It is claimed by appellant that this testimony by Paddock overcomes the ~~evidenc~~ evidence of appellee and the trial court should have held accordingly.

We do not agree with this contention. There are certain undisputed facts in evidence which speak louder than the evidence of Hugh E. Paddock or any other witness. On June 24, 1920, appellee wanted to use $5000. He had on deposit in the Bank of Prophetstown more than that amounto of money. He went to the bank to withdraw the money. He was induced to leave his money on deposit and to give the note in question for $5000. He received the money from the Bank of Prophetstown. His note wasdelivered to the bank, where

vs. Young, 209 Ill. 27; Morgenroth vs. Link, 227 Ill. App. 244. The facts as found in our former opinion are binding upon this appeal except in so far as they are changed by new evidence introduced upon the last trial.

At the time the note in question was signed and delivered by appellee it contained the name of no payee, that space being left blank. We held on the former appeal that it was agreed between the parties that the payee should be the Bank of Prophetstown and that the name of that bank was to be written in the blank space; that on account of the fact that the appellant was made the payee without authority or subsequent ratification by appellee that there could be no recovery against appellee. Appellant now contends that on the second trial new evidence was introduced which requires us to change our ruling on the question.

On the first trial appellee testified that there was no payee in the note at the time it was signed. The space was left blank but it was agreed that the bank of Prophetstown should be the payee. There was practically no other evidence on this point. At the second trial appellee testified substantially as he did on the first trial, but Hugh E. Paddock, who conducted the negotiations for the note with appellee, testified that there were no directions, agreement or instructions as to who the payee should be. It is claimed by appellant that this testimony by Paddock overcomes the evidence of appellee and the trial court should have held accordingly.

We do not agree with this contention. Disputed facts in evidence which speak louder than the evidence of Hugh E. Paddock or any other witness. On June 24, 1920, appellee wanted to use $6000. He had on deposit in the Bank of Prophetstown more than that amount of money. He went to the bank with draw the money. He was induced to leave his money on deposit and to give the note in question for $6000. He received the money from the Bank of Prophetstown. His note was delivered to the bank, where

it remained without a payee until July 3, 1920, when it was transferred to appellant and appellant's name was stamped in as as pyyee. On August 17, 1920, after the note was transferred to appellant $742, was paid by appellee on the principal to the Bank of Prophetstown and later this money was paid to appellant by Paddock. On October I, 1920, appellee wanted to pay $3000. on the principal, but was induced by Paddock not to do so, but he was induced to place the money on deposit in the Bank of Prophetstown. On neither of these last two occasions was appellee informed that the note was the property of appellant. It was not until January 4, 1921, when appellee received notice from appellant, that appellee knew the note belonged to appellant. The new evidence introduced on the second trial to the effect that there was no agreement as to the name of the payee to be placed in the note was not sufficient to change our former finding on that point.

We held upon the former appeal that the act of the cashier of appellant in inserting appellant's name in the note as payee, under the evidence, was not ratified by appellee so as to make him liable for the payment of the note. It is insisted by appellant that the evidence on the first trial on this point was of a passive nature, while on the last trial it was of a positive character; that it shows that appellee did not rely on what the cashier of appellant told him with reference to the payee of the note, but that the evidence shows that appellee saw the note, admitted his signature, and thereby ratified the note and its payee the same as if he had executed a new note in place of it; that it takes no more evidence to ratify a contract already made than it takes to make it in the first instance. We have examined the evidence on the last trial to see if it sustains this contention. We are unable to discover very much difference in the evidence on the two trials, or that the evidence on the last trial was more positive than it was on the first. The note was transferred to appellant on July 3, 1920, and yet on August 17, 1920, appellee paid $742. on the note to the Bank of Prophetstown and it was

it remained without a payee until July 2, 1920, when it was transferred to appellant and appellant's name was stamped in as the payee. On August 17, 1920, after the note was transferred to appellant $742, was paid by appellee on the principal to the Bank of Hopkinstown and later this money was paid to appellant by Haddock. On October 1, 1920, appellee wanted to pay $3000. on the principal, but was induced by Haddock not to do so, but he was induced to place the money on deposit in the Bank of Hopkinstown. On neither of these last two occasions was appellee informed that the note was the property of appellant. It was not until January 4, 1921, when appellee received notice from appellant, that appellee knew the note belonged to appellant. The new evidence introduced on the second trial to the effect that there was no agreement as to the name of the payee to be placed in the note was not sufficient to change our former finding on that point.

We hold upon the former appeal that the act of the cashier of appellant in inserting appellant's name in the note as payee, under the evidence, was not ratified by appellee so as to make him liable for the payment of the note. It is insisted by appellant that the evidence on the first trial on this point was of a passive nature, while on the last trial it was of a positive character; that it shows that appellee did not rely on what the cashier of appellant told him with reference to the payee of the note, but that the evidence shows that appellee saw the note, admitted his signature, and thereby ratified the note and the payee the same as if he had executed a new note in place of it; that it takes no more evidence to ratify a contract already made than it takes to make it in the first instance. We have examined the evidence on the last trial to see if it warrants this conclusion. We are unable to discover very much difference in the evidence on the two trials, or that the evidence on the last trial was more positive than it was on the first. The note was transferred to appellant on July 2, 1920, and got on August 17, 1920, appellee paid $742. on the note to the Bank of Hopkinstown and it was

accepted the same as if that bank owned the note. On October I, 1920, appellee offered to pay $3000 on the note and still he was not informed that the note belonged to appellant. The Bank of Prophetstown closed its doors on December 31, 1920, and on January 4, 1921, appellee received notice from appellant that it owned the note. This was the first notice that appellee had that appellant owned the note. He immediately went to the bank and did not formally demand to see the note as claimed by appellant, but he asked to see it. He testified he did not have his glasses and did not look to see who was the payee, but merely looked to see if it was his signature to the note. He saw that it was his signature and did not inspect it any closer. He is not seriously contradicted in this respect by the evidence on behalf of appellant. The note was put in judgment in July, 1921, and appellee testified he examined the note in the clerk's office after it was put in judgment, and discovered that appellant was the payee. After carefully examining the evidence relative to a ratification by appellee we see no reason for changing the views expressed in our former opinion.

Appellant contends that appellee by filing his claim in bankruptcy against the estate of George E. Paddock ratified the note and is now liable for its payment. This question was fully considered upon the former appeal. The evidence relative thereto is the same and we see no good reason for changing the views at that time expressed.

The judgment of the trial court was in accordance with evidence and the law as announced by this court on the former appeal and for that reason the judgment will be affirmed.

Judgment affirmed.

accepted the same as if that bank owned the note. On October 1, 1930, appellee offered to pay $8000 on the note and while he was not informed that the note belonged to appellant. The bank of Hopkinstown closed its doors on December 31, 1930, and on January 4, 1931, appellee received notice from appellant that it owned the note. This was the first notice that appellee had that appellant owned the note. He immediately went to the bank and did not formally demand to see the note as claimed by appellant, but he asked to see it. He testified he did not have his glasses and did not look to see who was the payee, but merely looked to see if it was his signature to the note. He saw that it was his signature and did not inspect it any closer. He is not seriously contradicted in this respect by the evidence on behalf of appellant. The note was put in judgment in July, 1931, and appellee testified he examined the note in the clerk's office after it was put in judgment, and discovered that appellant was the payee. After carefully examining the evidence relative to a retinkering by appellee we see no reason for changing the views expressed in our former opinion.

Appellant contends that appellee by filing his claim in bankruptcy against the estate of George A. Anderson rendered the note and is now liable for its payment. This question was fully considered upon the former appeal. The evidence relative thereto is the same and we see no good reason for changing the views at that time expressed.

The judgment of the trial court was in accordance with evidence and the law as announced by this court on the former appeal and for that reason the judgment will be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7334 Ag. 30

Raymond F. List,
appellee,
vs.
Joseph McKiskie,
appellant,

235 I.A. 623

Appeal from the Circuit Court
of Boone County,

Partlow, J.

Appellee, Raymond F. List, filed his bill in the circuit court of Boone county against appellant, Joseph McKiskie, praying for an injunction to restrain appellant from disposing of twenty-seven shares of stock of the National Sewing Machine Company alleged to be pledged by appellee to appellant as security for an indebtedness to appellant, and for a decree ordering appellant to deliver the stock to appellee. Appellant answered the bill, there was a hearing before the chancellor, a decree entered as prayed, and from that decree this appeal is prosecuted.

The Rogers Grain Products Company was organized in December, 1920, at Belvidere, Boone county, for the purpose of dealing in feed and distributing mill-feed in northern Illinois and southern Wisconsin. Its name was afterwards changed to the Boston Milling Company. From August 1, 1921, to July 15, 1922, appellee was connected with the company. During all, or a part of this time, he was a stockholder, director, treasurer and manager. F. W. Boston was secretary of the company. Appellant began work for the company on August 1, 1921, as a salesman and buyer, and continued as such until October 21, 1922. Almost from the time of its organization the company was in financial difficulties and could not promptly pay its obligations. This continued until in January, 1923, when it was adjudged a bankrupt . David Patton was the president of the National Sewing Machine Company and was the father-in-law of appellee. In July, 1921, appellant sold to the Milling Company,

Gen. No. 7554 No. 50

Raymond T. Ilet,
appellee,

vs.

Joseph Mollaklie,
appellant.

Appeal from the Circuit Court
of Boone County.

2351 I.A. 623

Hartley, J.

Appellee, Raymond T. Ilet, filed his bill in the circuit court of Boone county against appellant, Joseph Mollaklie, praying for an injunction to restrain appellant from disposing of twenty-seven shares of stock of the National Sewing Machine Company alleged to be pledged by appellee to appellant as security for an indebtedness to appellant, and for a decree ordering appellant to deliver the stock to appellee. Appellant answered the bill, there was a hearing before the chancellor, a decree entered as prayed, and from that decree this appeal is prosecuted.

The Rogers Grain Products Company was organized in December, 1920, at Belvidere, Boone county, for the purpose of dealing in feed and distributing mill-feed in northern Illinois and southern Wisconsin. Its name was afterwards changed to the Boston Milling Company. From August 1, 1921, to July 15, 1922, appellee was connected with the company. During all, or a part of this time, he was a stockholder, director, treasurer and manager. W. Boston was secretary of the company. Appellant began work for the company on August 1, 1921, as a salesman and buyer, and continued at work until October 21, 1922. Almost from the time of its organization the company was in financial difficulties and could not promptly pay its obligations. This continued until in January, 1922, when it was adjudged a bankrupt. David Ratton was the president of the National Sewing Machine Company and was the father-in-law of appellee. In July, 1921, appellant sold to the Milling Company,

$381 worth of oats for which he never was paid. The Milling Company was also indebted to a son-in-law of appellant for about $1250 for grain sold the company. In the early part of 1922, the Milling Company borrowed of one McIntosh, $1000 and gave as security therefor, the note of the Milling Company with appellant as security which note was subsequently paid by appellant and he never was repaid by the company. In April, 1922, appellee had a talk with appellant relative to borrowing $2300 to pay the debts of the Milling Company. As a result of this conversation, on May 21, 1922, appellant loaned to appellee $2300 and took appellee's personal note therefor. At the same time, appellee gave to appellant twenty-seven shares of stock of the National Sewing Machine Company owned by appellee, of the par value of $50 a share. Appellee claims the proceeds of the $2300 note was used to pay the $1250 owing by the Milling Company to the son-in-law of appellant for grain bought, and that the balance of the $2300 was used to pay for a car load of chicken feed purchased by the Milling Company for which it was unable to pay, the car then being on the railroad tracks. Appellee contends that the twenty-seven shares of stock were put up by him as security for the payment of the $2300 note and for no other purpose. Appellant contends that he loaned appellee the $2300 on appellee's own personal note for the reason that appellee was financially responsible, and that the twenty-seven shares of stock were put up as security for the $1381 which the Milling Company owed appellant, being the $381 for grain sold and the $1000 on the McIntosh note. When the $2300 note became due, it was not paid, appellant put it in judgment and execution was issued thereon. Appellee paid the judgment and made a demand on appellant for the delivery of the twenty-seven shares of stock. Appellant refused to deliver the stock on the ground that it was not put up as security for the $2300 note but was security for the $1381. Upon the refusal of appellant to deliver the stock appellee filed the bill in this case, set up the facts substantially as above stated, prayed for an injunction to restrain appellant from selling, or disposing,

$381 worth of oats for which he never was paid. The Milling Company was also indebted to a non-in-law of appellant for about $1250 for grain sold the company. In the early part of 1922, the Milling Company borrowed of one McIntosh, $1000 and gave as security therefor, the note of the Milling Company with appellant as security which note was subsequently paid by appellant and he never was repaid by the company. In April, 1922, appellee had a talk with appellant relative to borrowing $2500 to pay the debts of the Milling Company. As a result of this conversation, on May 21, 1922, appellant loaned to appellee $2500 and took appellee's personal note therefor. At the same time, appellee gave to appellant twenty-seven shares of stock of the National Sewing Machine Company owned by appellee, of the par value of $50 a share. Appellee claims the proceeds of the $2500 note was used to pay the $1250 owing by the Milling Company to the son-in-law of appellant for grain bought, and that the balance of the $2500 was used to pay for a car load of chicken feed purchased by the Milling Company for which it was unable to pay, the car then being on the railroad tracks. Appellee contends that the twenty-seven shares of stock were put up by him as security for the payment of the $2500 note and for no other purpose. Appellant contends that he loaned appellee the $2500 on appellee's personal note, the Milling Company was financially responsible, and that the twenty-seven shares of stock were put up as security for the $1381 which the Milling Company owed appellant, being the $381 for grain sold and the $1000 on the McIntosh note. When the $2500 note became due, it was not paid, appellant and Mr. McIntosh and wife were interested.

Appellee paid the judgment and made a demand on appellant for the delivery of the twenty-seven shares of stock. Appellant refused to deliver the stock on the ground that it was not put up as security for the $2500 note but was security for the $1381. Upon the refusal of appellant to deliver the stock appellee filed the bill in this case, set up the above substantially as above stated, prayed for an injunction to restrain appellant from selling, or disposing,

of the stock pending the hearing, and that upon a final hearing appellant be ordered to deliver the stock to appellee. Appellant answered the bill denying that the stock was put up as security for the $2300 note and alleging that it was put up as security for the $1381 debt.

It is stated by appellant in his brief and argument that the only question in this case for review is the question of fact as to which of the two obligations the twenty-seven shares of stock was pledged to secure. Only four persons were called as witnesses, appellant, appellee, Boston and Patton. The last two witnesses testified on behalf of appellee, and appellant was the only witness on his side of the case. Appellant and appellee testified diametrically opposite to each other and in accordance with their respective claims as above set forth. In addition to what has already been stated, appellee testified that at the time the $2300 note was given, nothing was said about the Milling Company being indebted to appellant in any amount; that appellee thought the Milling Company was indebted to appellant for $175 advanced by appellant to release a bill of lading on some sacks, but at that time he did not know that the Milling Company was indebted to appellant for $1000 on the McIntosh note; that appellee left the employ of the Milling Company on July 15, 1922, and began working for the National Sewing Machine Company; that it was not until October, 1922, that he first learned that the Milling Company owed appellant $1000 on the McIntosh note. Appellant contends that the statement of appellee that he was ignorant of the $1381 indebtedness at the time the $2300 note was given, is highly improbable for the reason that appellee was the treasurer of the Milling Company and must have known of its financial condition and of this $1000 McIntosh note, and that in several conversations appellee admitted this knowledge. Patton testified that in October, 1922, he met appellant on the street and appellant said he had a note against appellee for $2300 and mentioned that the twenty-seven shares of

of the stock pending the hearing, and that upon a final hearing appellant be ordered to deliver the stock to appellee. Appellant answered the bill denying that the stock was put up as security for the $2500 note and alleging that it was put up as security for the $1201 debt.

It is stated by appellant in his brief and argument that the only question in this case for review is the question of fact as to which of the two indebtedness the twenty-seven shares of stock was pledged to secure. Only three persons were called as witnesses, appellee, appellant, Charles and Ethel. The last witnesses testified on behalf of appellee, and appellant was the only witness on his side of the case. Appellant and appellee testified diametrically opposite to each other and in accordance with their respective claims as above set forth. In addition to what has already been stated, appellee testified that at the time the $2500 note was given, Ethel was still owing the Milling Company being indebted to appellant in any amount; that appellee thought the Milling Company was entitled to credits for $1201 advanced by appellant to release a bill of lading on some goods, but at that time he did not know that the Milling Company was indebted to appellant for $1200 as the testimony shows that appellee left the employ of the Milling Company on July 12, 1917, that Mayer worked for the National Sewing Machine Company; that it was not until October, 1920, that he first learned that the Milling Company owed appellant $1200 on the disputed note. Appellant testified that the statement of appellee that it was important if the first indebtedness at the time the $2500 note was given, is highly improbable for the reason that appellee was the treasurer of the Milling Company and must have known of its financial condition and of this large Hollibush note, and that in account conversations appellee admitted this knowledge. Ethel testified that in October, 1919, he met appellant on the street and appellant said he had a note against Mayer for $2500 and wanted that the transaction [illegible]

stock of the National Sewing Machine Company were collateral for the note; that nothing was said in this conversation about the $381, or the $1000. He further testified that a few days later he had another talk with appellant in which appellant said he had an open account amounting to several hundred dollars and gave Patton to understand appellee was liable for it. Patton called appellant's attention to the fact that the open account had not been mentioned by appellant in their first conversation. Patton told appellant the note could be taken care of provided the collateral was surrendered, and appellant said the collateral could not be surrendered until the open account was paid. Patton also testified that in this second conversation nothing was said about the $1000 note. Patton also testified that some days later he had a conversation with counsel for appellant in which counsel told him there was a thousand dollar note, and Patton replied that he had never heard of it before. Patton testified he did not think appellant ever mentioned the $1000 note to him. On direct examination Boston testified he had a talk with appellant in which appellant said he had the stock as collateral for the $2300 note; that the witness could not recall that appellant said the collateral was to apply on the open account; that appellant said he should have the stock to cover the additional money, but he did not say the collateral covered anything except the $2300; that his recollection was that the first time he learned the collateral was to cover anything except the $2300 was after the company went into bankruptcy. On cross examination, however, Boston testified that he heard on several occasions before the bankruptcy, the appellant claimed the collateral should cover the indebtedness other than the $2300; and that appellant said the stock was put up to cover the other indebtedness. Appellant testified that the stock was given as security for the $1381, and not for the $2300; that Boston told appellant that appellee was good for the $2300, and that appellant had security for the balance of the indebtedness. He testified that in the first talk with Patton he told Patton about the $381, and that he did not think he told Patton at that time that

stock of the National Sewing Machine Company were collateral for the note; that nothing was said in this conversation about the $921, or the $1000. He further testified that a few days later he had another talk with appellant in which appellant said he had an open account amounting to several hundred dollars and gave Patton to understand appellee was liable for it. Patton called appellant's attention to the fact that the open account had not been mentioned by appellant in their first conversation. Patton told appellant the note could be taken care of provided the collateral was surrendered, and appellant said the collateral could not be surrendered until the open account was paid. Patton also testified that in this second conversation nothing was said about the $1000 note. Patton also testified that some days later he had a conversation with counsel for appellant in which counsel told him there was a thousand dollar note, and Patton replied that he had never heard of it before. Patton testified in his direct examination that at the time he made at the time. In first conversation with appellant in which appellant said he had the stock as collateral for the $2500 note; that the witness could not recall that appellant said the collateral was to apply on the open account; that appellant said he should have the stock to cover the additional money, but he did not say the collateral covered anything except the $2500; that his recollection was that the first time he learned the collateral was to cover anything except the $2500 was after the company went into bankruptcy. On cross examination, however, Boston testified that he heard on several occasions before the bankruptcy, the appellant claimed the collateral should cover the indebtedness other than the $2500; and that appellant said the stock was put up to cover the other indebtedness. Appellant testified that the stock was given as security for the $921, and not for the $2500; that Boston told appellant that appellee was good for the $2500, and that appellant had security for the balance of the indebtedness. He testified that in the first talk with Patton he told Patton about the $921, and that he did not think he told Patton at that time that

he had security for the $2500. Then the appellant testified "I guess I did, come to think". He later denied that he told Patton the stock was to secure the $2500, and said he told Patton it was to secure the other indebtedness. On cross examination appellant said he did not testify on direct examination that he told Patton the stock was to secure the $2500, that if he did so testify it was a misunderstanding on his part. He admitted that Patton told him, in their second conversation, as testified to by Patton, that nothing had been said in the first conversation about the $381 and the $1000, but he testified that in the first conversation he told Patton about the $381.

We have attempted to set out in detail, so far as space will permit, the salient facts and testimony. It may be there are other facts which should be stated but these are sufficient to determine the question at issue. It is apparent from this testimony that it is in sharp conflict. There are contradictions, misstatements, and possibly misrepresentations. These are not confined to one side, but are on both sides. We have read the evidence with considerable care. Appellee is corroborated in several important respects by Boston and Patton. We are impressed, from the reading of this evidence, that appellant was not a very good witness. He not only contradicted himself in several important respects, but he seems to have been very uncertain as to many important details. He testified to one certain state of facts, and then within a few minutes contradicted himself, and said that he did not so testify. Under these circumstances much must depend upon the appearance of the witnesses on the stand and their manner of testifying in order to correctly determine the weight of the evidence. We are deprived of this privilege and must depend upon the evidence as it appears in the record. If the chancellor believed the testimony of the witnesses on behalf of appellee, he was justified in entering the decree. The chancellor saw the witnesses and heard them testify and is in a better position than we are to determine the truth of

he had security for the $2500. Then the appellant testified "I guess I did, some to think". He later denied that he told Patton the stock was to secure the $2500, and said he told Patton it was to secure the other indebtedness. On cross examination appellant said he did not testify on direct examination that he told Patton the stock was to secure the $2500, that if he did so testify it was a misstatement on his part. He admitted that Patton told him, in their second conversation, as testified to by Patton, that nothing had been said in the first conversation about the $521 and the $1000, but he testified that in the first conversation he told Patton about the $521.

We have attempted to set out in detail, so far as space will permit, the salient facts and testimony. It may be there are other facts which should be stated but these are sufficient to determine the question at issue. It is apparent from the testimony that it is in sharp conflict. There are contradictions, misstatements, and possibly misrepresentations. These are not confined to one side, but are on both sides. We have read the evidence with considerable care. Appellee is corroborated in several important respects by Boston and Patton. We are impressed, from the reading of this evidence, that appellant was not a very good witness. He not only contradicted himself in several important respects, but he seems to have been very uncertain as to many important details. He testified to one certain state of facts, and then within a few minutes contradicted himself, and said that he did not so testify. Under these circumstances much must depend upon the appearance of the witnesses on the stand and their manner of testifying in order to correctly determine the weight of the evidence. We are deprived of this privilege and must depend upon the evidence as it appears in the record. If the chancellor believed the testimony of the witnesses on behalf of appellee, he was justified in entering the decree. The chancellor saw the witnesses and heard them testify and is in a better position than we are to determine the truth of

the controversy. We are not at liberty to disturb the finding of the chancellor unless we can say it is manifestly against the weight of the evidence. We do not feel that the decree is against the manifest weight of the evidence, but, in fact, we are of the opinion that it is in accordance with the manifest weight of the evidence. For these reasons the decree will be affirmed.

Decree affirmed.

the controversy. We are not at liberty to disturb the finding of the chancellor unless we see any it is manifestly against the weight of the evidence. We do not feel that the decree is against the manifest weight of the evidence, but, in fact, we are of the opinion that it is in accordance with the manifest weight of the evidence. For these reasons the decree will be affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct 8, 1924.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7331 Ag. 27

235 I.A. 623

Ezra Holtzman,

appellee,

vs.

Thomas E. Robinson,

appellant,

Appeal from the City Court of the City of Sterling.

Partlow, J.

Appellee, Ezra Holtzman, obtained judgment for $1000 in the city court of the city of Sterling against appellant, Thomas E. Robinson, for fraud and deceit, and this appeal followed.

In June, 1922, appellee was the owner of an automobile truck which he traded to the appellant for a note of $1000. Appellant represented to appellee, at the time of the trade, that the note was good and that the maker thereof owned property more than was sufficient to satisfy the note. Appellant, however, endorsed the note without recourse. Before the note became due, the maker filed a petition in bankruptcy, listing the note as a liability, whereupon appellee began suit against appellant for fraud and deceit, alleging that appellant had misrepresented the value of the note and the financial responsibility of the maker.

It is claimed by appellant that there is a variance between the declaration and the proof; that the declaration is based upon the value of the truck while the proof is based upon the value of the note, hence there is no proof of damages on which to base the verdict; that the court improperly instructed the jury that the measure of damages was the value of the note instead of the value of the truck. In speaking of the measure of damages in his brief appellant says:- "There is an appalling conflict of authority upon this question. Some states follow one rule, some follow the other, and some (including Illinois) have applied first one rule and then the other with utmost disregard of the established principle, resulting in the hopeless confusion of law and lawyers. With such a conflict in authority, we

Gen. No. 7881 Ag. 27

235 I.A. 623

Hare Holtzman,

appellee,

vs.

Appeal from the City Court of the City of Sterling.

Thomas H. Robinson,

appellant.

Partlow, J.

Appellee, Hare Holtzman, obtained judgment for $1000 in the city court of the city of Sterling against appellant, Thomas H. Robinson, for fraud and deceit, and this appeal followed.

In June, 1922, appellee was the owner of an automobile truck which he traded to the appellant for a note of $1000. Appellant represented to appellee, at the time of the trade, that the note was good and that the maker thereof owned property more than was sufficient to satisfy the note. Appellant, however, endorsed the note without recourse. Before the note became due, the maker filed a petition in bankruptcy, listing the note as a liability, whereupon appellee began suit against appellant for fraud and deceit, alleging that appellant had misrepresented the value of the note and the financial responsibility of the maker.

It is claimed by appellant that there is a variance between the declaration and the proof; that the declaration is based upon the value of the truck while the proof is based upon the value of the note, hence there is no proof of damages on which to base the verdict; that the court improperly instructed the jury that the measure of damages was the value of the note instead of the value of the truck. In speaking of the measure of damages in his brief appellant says:- "There is an appalling conflict of authority upon this question. Some states follow one rule, some follow the other, and some (including Illinois) have applied first one rule and then the other with utmost disregard of the established principle, resulting in the hopeless confusion of lay and lawyers. With such a conflict in authority, we

believe this court is free to decide the question as if it were one of first impression. And we would respectfully suggest that the proper way to decide the question is to get at the fundamental principle involved, and work out a logical result from it."

In all of these contentions we think appellant is laboring under a misapprehension. The declaration is based upon the value of the note and not on the value of the truck. It sets out the facts incident to the trade, and alleges that the automobile truck was worth $1100, but concludes with the allegation that the note is still in the possession of the appellee and unpaid; that the maker has failed in business, been adjudged a bankrupt, has scheduled said note as part of his indebtedness, and that said note at the time of its transfer by appellant, was worthless; and so the appellant deceived and defrauded appellee to the damage of appellee in the sum of $1100, and therefore he brings this suit. These averments must be construed as declaring upon the value of the note. It is true the value of the automobile truck is alleged in the declaration as being $1100. The note was for $1000. If the declaration had concluded to the damage of the plaintiff in the sum of $1000 instead of $1100, we do not think there could be any controversy but what the damages were based upon the value of the note and not the value of the truck.

Not only do we think the declaration is based upon the value of the note, but this is in accordance with the settled law of this state. As a general rule, in an action on the case for fraudulent representations in the sale of property, the measure of the damages is the difference between the value of the property as it is and what it would be worth if the representations had been true. Drew vs. Neall, 62 Ill. 164; Antle vs. Sexton, 137 Ill. 410; Laughlin v. Hopkinson, 292 Ill. 80; Hazelton vs. Crolus, 132 Ill. App. 512. But in an action for fraud and deceit for the sale or exchange of notes it was held in Schwitters vs. Springer, 256 Ill. 271, that the measure of the damages for the sale of notes upon which the defendant is not personally liable, as in this case, is the difference between their actual value and what their value would have been at the time of

believe this court is free to decide the question as if it were one of first impression. And we would respectfully suggest that the proper way to decide the question is to get at the fundamental principle involved. [illegible]

In all of these contentions we think appellant is labouring under a misapprehension. The declaration is based upon the value of the note and not on the value of the truck. It sets out the facts incident to the trade, and alleges that the automobile truck was worth $1100, but concludes with the allegation that the note is still in the possession of the appellee and unpaid; that the maker has failed in business, been adjudged a bankrupt, has scheduled said note as part of his indebtedness, and that said note at the time of its transfer by appellant, was worthless; and so the appellant deceived and defrauded appellee to the damage of appellee in the sum of $1100, and therefore he brings this suit. These averments must be construed as declaring upon the value of the note. It is true the value of the automobile truck is alleged in the declaration as being $1100. The note was for $1000. If the declaration had concluded to the damage of the plaintiff in the sum of $1000 instead of $1100, we do not think there could be any controversy but what the damages were based upon the value of the note and not the value of the truck.

Not only do we think the declaration is based upon the value of the note, but this is in accordance with the settled law of this state. As a general rule, in an action on the case for fraudulent representations in the sale of property, the measure of the damages is the difference between the value of the property as it is and what it would be worth if the representations had been true. Ihmsen vs. Ewell, [illegible] 194; [illegible] vs. [illegible], 147 Ill. [illegible]; [illegible], 292 Ill. 80; Wasmiton vs. Overing, 182 Ill. 499, 502. But in an action for fraud and deceit for the sale or exchange of notes it was held in Schmittere vs. Springer, 286 Ill. 271, that the measure of the damages for the sale of notes upon which the defendant is not personally liable, as in this case, is the difference between their actual value and what their value would have been at the time of

the transaction had the defendant's representations been true, with interest at 5 per cent to the time of the trial. To the same effect is Stewart vs. Clark, 194 Ill. App. 2. The evidence shows that the $1000 note exchanged for the automobile truck was of no value at all, hence the measure of damages was the face value of the note with interest thereon up to the date of the trade. For this reason, and for the reason that the declaration declared upon the value of the note, there was no variance between the declaration and the proof, the court properly instructed the jury as to the measure of the damages, hence the verdict is sustained by the evidence.

Complaint is made of the first, second and fourth instructions given on behalf of appellee. Examination of these instructions does not lead us to believe that they are subject to the criticisms made against them. We find no reversible error and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and ~~twenty~~-four

Justus L. Johnson

Clerk of the Appellate Court.

3946

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7337

In the Matter of the Estate)
of Julius Zick.)
Plaintiff in Error,)
vs.) Error to the Circuit Court
Louis Baumgartner,) of McHenry County.
Defendant in Error.)

Partlow, J.

At the July term, 1920, of the county court of McHenry county, Julius Zick was adjudged to be an unfit person to care for his property and estate, and defendant in error, Louis Baumgartner, was appointed as his conservator. At the October term, 1921, of the county court of McHenry county, Zick filed his petition to be adjudged a fit person to manage his estate and to have the same restored to him. There was a trial by jury in the county court on November 3, 1921, a verdict finding that he was a fit person to manage his estate, and an appeal was prosecuted to the circuit court, where there was a trial by jury at the January term, 1923, a verdict finding he was not a fit person to manage his estate, and an appeal has been prosecuted to this court.

It is urged that the verdict is not sustained by the evidence. The evidence shows that Zick was born in Germany in 1844 and was married in the old country. In 1869 he came to this country and his three daughters were born here. He worked on a farm for one year, later rented a farm for two years and then purchased a farm of 100 acres near Huntley, Illinois, paying only $200 on the purchase price. When he was 27 years old both of his hands were crippled in a binder. His wife died and he continued to live on the farm until 1914 when he sold it and moved to Huntley where he continued to live until the petition for a conservator was filed. After the conservator was appointed he moved to Union where he has since lived with a son-in-law, Henry Boro, who now owes him $9,500. At the time the conservator

Sup. Ct. 42477

In the Matter of the Estate of Julius Zick.	
Plaintiff in Error,	
vs.	Error to the Circuit Court
Louis Baumgartner,	of McHenry County.
Defendant in Error.	

Trial: V.

At the July term, 1920, of the county court of McHenry county, Julius Zick was adjudged to be an unfit person to care for his property and estate, and defendant in error, Louis Baumgartner, was appointed as his conservator. At the October term, 1921, of the county court of McHenry county, Zick filed his petition to be adjudged a fit person to manage his estate and to have the same restored to him. There was a trial by jury in the county court on November 3, 1921, a verdict finding that he was a fit person to manage his estate, and an appeal was prosecuted to the circuit court, where there was a trial by jury at the January term, 1922, a verdict finding he was not a fit person to manage his estate, and an appeal has been prosecuted to this court.

It is urged that the verdict is not sustained by the evidence. The evidence shows that Zick was born in Germany in 1844 and was married in the old country. In ~~1882~~ 1882 he came to this country and his three daughters were born here. He worked on a farm for one year, later rented a farm for two years and then purchased a farm of 100 acres near Huntley, Illinois, paying only $200 on the purchase price. When he was 67 years old both of his hands were crippled in a binder. His wife died and he continued to live on the farm until 1914 when he sold it and moved to Huntley where he continued to live until the petition for a conservator was filed. After the conservator was appointed he moved to Union where he has since lived with a son-in-law, Henry Sorg, who now owes him $2,500. At the time the conservator

was appointed he had about $20,000 worth of property, part of which he had loaned out. He also owned a house in Huntley. During the time he lived on the farm his daughters worked in the fields performing all kinds of farm labor. When they were married he gave each of them $1,000. He testified he had always been in good health, had earned all of his property, that there had never been any trouble between him and his daughters, that they had always been kind and considerate to him, but that they got mean after the conservator was appointed. Notwithstanding the fact that he testified he was in good health it appears that he had some physical ailments which had caused him some trouble. Dr. W. V. Gooder testified he examined Zick about 1916 and Zick was suffering from a degenerate heart, dropsy and ulcers. Fifteen witnesses testified for Zick and eight witnesses testified for the other side. Practically all of the fifteen witnesses called by Zick testified that in their opinion he was able to properly care for his property. In almost every instance they were asked their opinion without any preliminary foundation for it. They had met him at more or less frequent intervals and talked with him. They did not testify what the conversation was about but expressed their opinion as to his mental condition. Under these circumstances, it is very difficult to accurately determine what weight should be given to their testimony. On the other hand, Dr. Gooder not only testified what diseases Zick was suffering from in 1916, but he testified these diseases might have affected his mind. He saw Zick ten months before the trial and there was a very little change in his mental condition but possibly he was a little better. The doctor also stated he may have testified on the former trial that Zick was suffering from senile dementia, but he was not sure of his testimony. He expressed no opinion as to Zick's ability to do business. Four witness testified they went to see Zick for the purpose of trying to settle the differences between him and his children. Zick refused to make

was appointed he had about $20,000 worth of property, part of which he had loaned out. He also owned a horse in Huntley. During the time he lived on the farm his daughters worked in the fields performing all kinds of farm labor. When they were married he gave each of them $1,000. He testified he had always been in good health, had carried all of his property, that there had never been any trouble between him and his daughters, that they had always been kind and considerate to him, but that they got mean after the conservator was appointed. Notwithstanding the fact that he testified he was in good health it appears that he had some physical ailments which had caused him some trouble. Dr. W. V. Hooker testified he examined Nick about 1910 and Nick was suffering from a degenerate heart, dropsy and ulcers.

Fifteen witnesses testified for Nick and eight witnesses testified for the other side. Approximately all of the fifteen witnesses called by Nick testified that in their opinion he was able to properly care for his property. In almost every instance they were asked their opinion without any preliminary foundation for it. They had met him at more or less frequent intervals and talked with him. They did not testify that the conversation was about but expressed their opinion as to his mental condition. [illegible] it is very difficult to accurately determine what weight should be given to their testimony. [illegible]

[illegible] ified with diseases Nick was suffering from in 1910, but he testified these diseases might have affected his mind. He saw Nick ten months before the trial and there was a very little change in his mental condition but possibly he was a little better. The doctor also stated he may have testified on the former trial that Nick was suffering from senilendementia, but he was not sure of his condition. He expressed no opinion as to Nick's ability to do business. Four witnesses testified they went to see Nick for the purpose of trying to settle the difference between him and his children. Nick refused to make

any compromises. He said that he wanted to get his property into his own hands; that he wanted to get rid of it, to spend it and have a good time, or to give it away to somebody other than his children so the children would not get a cent; that after he got rid of his property he would go to the poor house.

The question is whether or not this evidence was sufficient to sustain the judgment. The purpose of the statute under which this conservator was appointed, was to prevent persons who are mentally incapable of caring for their property from squandering it so they will become objects of public charity. The evidence shows that the intentions of Zick were to get possession of his property, spend it, or give it away, so that his children could not get it. In so doing he would of necessity become an object of public charity, exactly what the statute seeks to prevent. If the jurors believed this was his purpose and intention, they were justified in finding by their verdict that he was an unfit person to manage his estate. It certainly cannot be successfully argued that a man who has the intention which the evidence shows is sound and normal mentally, or is a fit person to handle his property. The mere fact that fifteen witnesses testified without assigning reasons therefor that they thought he was capable of managing his estate does not change the fact that the purpose of Zick was to get rid of his property. The most of the testimony of these fifteen witnesses was the mere expression of a conclusion with nothing appearing in the evidence upon which to base it. The question presented to the jury was a question of fact. We are not at liberty to distrub their verdict unless it is clearly against the weight of the evidence. We are of the opinion that the evidence shows that Zick was not in such a mental condition as to be able to properly manage his estate, and for this reason we will not disturb the judgment on the ground that it is against the evidence.

Complaint is made that the court improperly admitted in evidence the verdict of the jury rendered on the first ~~trai~~ trial.

ing compromises. He said he wished to get his property into his own hands; that he wished to get rid of it, to spend it or have a good time, or to give it away to somebody other than his children or the children would not get a cent; that after he got rid of his property he would go to the poor house.

The question is whether or not this evidence was sufficient to sustain the judgment. The purpose of the statute under which this conservator was appointed, was to prevent persons who are habitually incapable of caring for their property from squandering it so that it will become subject of public charity. The evidence shows that the intention of that were to the conservation of his property, spend it, or give it away, so that his children would not get it.

of public charity, merely that the statute seeks to prevent. In the jurors believed this was his purpose and intention, they were justified in finding by their verdict that he was in fact about to dispose of it. It certainly cannot be successfully argued that a man who has the intention which the evidence shows in some and usual manner, or in a way proper to dispose his property. The mere fact that children expectant be entitled without a conscious reason therefor that they should be now growing or enjoying his estate does not alone the fact that the purpose of that man to get rid of his property. The fact of the testimony of these children showing that the mere speculation of a conclusion which nothing appears to the contrary upon which to base it. The question presented to the jury was a question of fact. We are not at liberty, to disturb their verdict unless it is clearly against the weight of the evidence. We are of the opinion that the evidence shows that that was not in such a mental condition as to be able to properly manage his estate, and the trial court was well and justified in proceeding on the ground that it is sufficient the evidence.

Finally, it is said that the court improperly admitted in evidence the testimony of the jury numbered [illegible] in the trial.

The court did admit the verdict without the signatures of the jurors. It was not disputed that Zick had been adjudged incompetent to care for his property. This fact was the basis of the petition. It was not only alleged in the petition but must, of necessity, have been stated to the jury at the beginning of the trial. The question the jury was called upon to determine was whether or not Zick had so improved mentally, since the first trial, that he was competent to care for his property. The jury fully understood the situation and no injury could possibly have been done to Zick by the admission of the first verdict in evidence.

The fourth, fifth and sixth instructions given on behalf of the defendant in error are critised. We have examined each of these instructions and do not think any of them is subject to the complaint made.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

The court did admit the verdict without the signatures of the jurors. It was not disputed that Rick had been adjudged incompetent to care for his property. This fact was the basis of the petition. It was not only alleged in the petition but must, of necessity, have been stated to the jury at the beginning of the trial. The question the jury was called upon to determine was whether or not Rick had so improved mentally, since the first trial, that he was competent to care for his property. The jury ~~at~~ fully understood the situation and no injury could possibly have been done to Rick by the admission of the first verdict in evidence.

The fourth, fifth and sixth instructions given on behalf of the defendant in error are criticised. We have examined each of these instructions and cannot think any of them is subject to the complaint made.

We find no reversible error and the judgment will be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty four.

Justus L. Johnson

Clerk of the Appellate Court.

Rehearing Denied
Oct 8, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Thomas & Clarke, a corporation,
appellee,

vs.

Hartford Accident and Indemnity
Company, a corporation,
appellant,

235 I.A. 623

Appeal from the Circuit Court
of Peoria County.

Partlow, J.

On September 20, 1922, appellee, Thomas & Clarke, a corporation, began suit in the circuit court of Peoria county, against appellant, Hartford Accident and Indemnity Company, a corporation. The declaration consisted of three counts. Two counts were predicated upon a bond executed by appellant to appellee, to indemnify appellee against pecuniary loss suffered through the acts of John F. Engel, Jr., an employee of appellee. The third count consisted of the common counts. The general issue was filed, together with notice of special matters of defense thereunder. There was a trial by jury, a verdict and judgment against appellant for $7466.59, and an appeal has been prosecuted to this court.

The evidence shows that appellee was engaged in the manufacture, distribution and sale of food products, with its principal office in Peoria, Illinois. It acted through its agents, servants, employees and through independent dealers. Engel, from 1912 to 1916, was the sole sales agent for appellee in Springfield, Illinois, and gave his personal bond to appellee for $5000.00, signed by his father, John F. Engel, Sr., as surety. The goods were sold to Engel at so much off list price and he ran the business in his own name. During the first two years he lost many accounts and was indebted to appellee in the sum of $4500.00 for goods purchased. He paid $2000.00 in cash, and on December 26, 1914, gave his note for the balance. This note was paid by means of credits allowed, and cash, and final

Appeal from the Circuit Court
of Peoria County.

Thomas & Clarke, a corporation,

Appellee,

v.

Hartford Accident and Indemnity
Company, a corporation,

Appellant.

Gentlemen.

On September 20, 1922, appellee, Thomas & Clarke, a corporation, began suit in the circuit court of Peoria county, against appellant, Hartford Accident and Indemnity Company, a corporation. The declaration consisted of three counts. Two counts were predicated upon a bond executed by appellant to appellee, to indemnify appellee against pecuniary loss sustained through the acts of John F. Nagel, Jr., an employee of appellee. The third count consisted of the common counts. The general issue was filed, together with notice of special matters of defense thereunder. There was a trial by jury, a verdict and judgment against appellant for $7466.89, and an appeal has been prosecuted to this court.

The evidence shows that appellee was engaged in the manufacture, distribution and sale of food products, with its principal office in Peoria, Illinois. It acted through its agents, servants, employees and through independent dealers. Nagel, from 1912 to 1916, was the sole sales agent for appellee in Springfield, Illinois, and gave his personal bond to appellee for $5000.00, signed by his father, John F. Nagel, Sr., as surety. The goods were sold to Nagel at so much off list price and he ran the business in his own name. During the first two years he lost many accounts and was indebted to appellee in the sum of $4500.00 for goods purchased. To pay $5000.00 he said, and on December 26, 1914, gave his note for the balance. This note was paid by means of credits allowed, and cash, and final

settlement was made on June 5, 1918. On October 1, 1916, a new contract was executed between Engel and appellee which provided that Engel was to receive a commission of twelve and one-half per cent on the net sales of all goods at Springfield. He was to pay all expenses of the business, and was to receive a refund on all sales which turned out to be bad accounts. This contract later in the same month, was modified and Engel was to receive a check each month for $100.00, together with twelve and one-half per cent of the total goods sold above $800.00. He was to send an itemized daily report to appellee. All money collected was to be deposited in the Ridgely Farmers' State Bank, of Springfield, to the credit of appellee, and duplicate deposit slips were to be sent appellee with the daily reports. On October 2, 1916, an indemnity bond for $5000.00 was executed by appellant to appellee on the employment of Engel. By the terms of this bond appellant bound itself to pay appellee, within sixty days after satisfactory proof thereof, such pecuniary loss as appellee should sustain of money or other personal property through larceny or embezzlement by Engel. Engel failed to comply with the terms of his contract with appellee. He used money for his own use belonging to the appellee. He falsified his daily reports so as to make them correspond with the money accounted for. He did not deposit a part of the money in the bank to the credit of appellee. He juggled his accounts and kept incorrect books. He opened an account in the name of his father with a bank in Springfield, deposited a part of appellee's money to this account and drew checks on the account under a power of attorney executed by his father. About January 1, 1922, E. I. Hardin became president of appellee, succeeding A. V. Thomas, who had died. Prior to this time the bond of Engel had continued at $5000.00. Hardin suggested that on account of the large amount of money belonging to appellee, handled by Engel, this bond should be increased to $10,000.00, and the increased bond was executed to date from February 2, 1922. Appellee had in its Peoria office a record of the accounts made up from Engel's reports, but his books were in the Springfield office.

settlement was made on June 5, 1918. On October 1, 1916, a new contract was executed between Engel and appellee which provided that Engel was to receive a commission of twelve and one-half per cent on the net sales of all goods at Springfield. He was to pay all expenses of the business, and was to receive a refund on all sales which turned out to be bad accounts. This contract lasted in the same month, was modified and Engel was to receive a check each month for $100.00, together with twelve and one-half per cent of the total goods sold above $800.00. He was to send in itemized daily report to appellee. All money collected was to be deposited in the Ridgely Bankers' State Bank, of Springfield, to the credit of appellee, and duplicate deposit slips were to be sent appellee with the daily reports. On October 2, 1918, an indemnity bond for $8000.00 was executed by appellant to appellee on the employment of Engel. By the terms of this bond appellant bound himself to pay appellee, within sixty days after ascertainment thereof, such pecuniary loss as appellee should sustain of money or other property through dishonesty on the part of Engel. Engel failed to comply with the terms of his contract with appellee. He used money for his own use belonging to the appellee. He falsified his daily reports so as to make them correspond with the money accounted for. He did not deposit a part of the money in the bank to the credit of appellee. He juggled his accounts and kept incorrect books. He opened an account in the name of his father with a bank in Springfield, deposited a part of appellee's money to this account and drew checks on the account under a power of attorney executed by his father. About January 1, 1922, V. I. Murphin became president of appellee, succeeding E. V. Tiffoman, who had died. Prior to this time the total of Engel's defalcations at $8000.00. Notwithstanding that on account of the large amount of money belonging to appellee, handled by Engel, this bond should be increased to $10,000.00, and the increased bond was executed to him from [illegible], 1922. Appellee had in its Peoria office a record of the accounts made up from Engel's reports, but his books were in the Springfield office.

The only way appellee could ascertain the true condition of his accounts would be by taking up the accounts directly with each debtor. Hardin immediately upon becoming president, noticed that the collections in the Springfield territory were slow and many of the accounts were delinquent. He wrote to Engel complaining of this condition and asking him to remedy it. Engel replied promising to go after the delinquent customers during the month of February, 1922. About March 1, 1922, Hardin, without the knowledge of Engel, sent statements directly from the Peoria office to all delinquent debtors. As soon as Engel heard this letter had been sent out, he went to the office in Peoria, about March 4, and told Hardin that some of those receiving notices did not owe anything; that he had given them additional discounts which he must stand himself; that his books were in confusion, but he could check them over and adjust each customer's account. Hardin was suspicious that there was something wrong, and he immediately notified Roswell-Bills Insurance Agency, through which agency he had secured this bond, that there was something wrong at the Springfield agency. On March 10, he wrote them that something was wrong at the Springfield agency, and that irregularities amounting to approximately $1400.00, had been discovered. An audit of the books was immediately started, which disclosed an embezzlement by Engel of $6918.91. Formal report thereof was made to the appellant, demand for payment was made under the bond, and upon its failure to pay this suit was commenced. The letter of March 10, by appellee to Roswell-Bills & Company was received at the Chicago office by appellant on March 13, 1920. At the time the bond was written the Roswell-Bills & Company were the agents of appellant, but prior to March 1, 1922, they had ceased to be the agent, and at that time the Tobias-Kellogg Company was the agent. Roswell-Bills & Company had written the bond, and when the premium became due, collected it and turned it over to the Tobias-Kellogg Company. It was stipulated that from December 1, 1921, to March 15, 1922, the shortage was $6918.91; that of this amount, $3958.31 was from December 1, 1921,

The only way appellee could ascertain the true condition of his account would be by taking up the accounts directly with each debtor. Martin immediately wrote letters to appellant, stating that the delinquencies in the Springfield territory were slow and many of the accounts were delinquent. He wrote to Angel complaining of this condition and asking him to remedy it. Angel replied promising to go after the delinquent accounts during the month of January, 1921. On March 1, 1921, Martin, without the knowledge of Angel, sent their secretary directly from the Peoria office to all delinquent debtors. As soon as Angel heard this letter had been sent out, he went to the office in Peoria, about March 4, and told Martin that some of those receiving notices did not owe anything; that he had given them additional discounts which he must attend himself; that his books were in confusion, but he would check them over and adjust each customer's account. Martin was sorry that there was a misunderstanding, and he immediately notified Gamble-Robinson Company, through which agency he had secured this bond, that there was something wrong at the Springfield agency. On March 10, he wrote them that something was wrong at the Springfield agency, and that irregularities amounting to approximately $1400.00, had been discovered. An audit of the books was immediately started, which disclosed an embezzlement by Angel of $5818.91. Formal report thereof was made to the appellant, demand for payment was made under the bond, and upon its failure to pay this suit was commenced. The letter of March 10, by appellee to Gamble-Robinson Company resulted in the Indiana action by appellant on March 14, 1920. At the time the bond was written the Somwell-Mills Company were the agents of appellant, but prior to March 1, 1922, they had ceased to be the agent, and at that time the Tobias-Kellogg Company was the agent. Somwell-Mills Company had written the bond, and when the premium became due, collected it and turned it over to the Tobias-Kellogg Company.

That from December 1, 1921, to March 14, 1922, the shortage was $5818.91; that of this amount, $5818.91 was from December 1, 1921,

to February 1, 1922, and $2960.00 was from February 1, 1922, to March 15, 1922, and that Engel kept the collections and did not report them to appellee.

The fourth condition of the bond was "The employer, immediately on becoming aware of any act giving rise to a claim hereunder, or facts indicating such acts, shall notify the surety at its home office by telegraph and registered letter, giving all known particulars, and within sixty days after discovery of any loss, shall file with the surety an itemized statement thereof under oath, and shall produce for investigation such books, vouchers and evidence in his possession as the surety may require."

Appellant contends that the notice provided in this section was not given; that it was not necessary before appellee was required to give this notice, for appellee to have actual knowledge or to be satisfied that Engel had actually embezzled funds; that it was no more than just that appellant should require immediate notice that Engel had committed acts giving rise to a claim; that Hardin, on March 4, 1922, had the confession of Engel that he had collected accounts and had not turned over proceeds, and Hardin made an affidavit in the proof of claim that he first had knowledge of Engel's misappropriation on March 4, 1922; that there is no allegation of waiver of notice in the declaration, and there is nothing in the proof that shows a waiver; that Hardin notified Roswell-Bills & Company, March 6, 1922, and again on March 10, 1922, which letter came into possession of appellant on March 13, 1922, and a few days later the attorney for appellant was on the ground; that where notice different from that provided in the policy is relied on, it must be shown that appellant's rights were not in any manner affected thereby; that ten days elapsed from March 4, 1922, before a representative was on the ground; that it is strange that appellee should find it necessary after an audit of Engel's books on January 31, 1922, and a meeting of the board of directors, on February 23, 1922, to increase the bond to $10,000.00; that there is an inference

to February 1, 1922, and $2000.00 was from February 1, 1922, to March 15, 1922, and that Nagel kept the collections and did not report them to appellee.

The fourth condition of the bond was the following, immediately on becoming aware of any act giving rise to a claim hereunder, or facts indicating such acts, shall notify the surety at its home office by telegraph and registered letter, giving all known particulars, and within sixty days after discovery of any loss, shall file with the surety an itemized statement thereof under oath, and shall produce for investigation such books, vouchers and evidence in its possession as the surety may require."

Appellant contends that the notice provided in this section was not given; that it was not necessary before appellee was required to give this notice, for appellee to have actual knowledge or to be satisfied that Nagel had actually embezzled funds; that it was enough that that evidence should require knowledge within that Nagel had committed acts giving rise to a claim; that March, on March 4, 1922, had the confession of Nagel that he had collected accounts and had not turned over proceeds, and March made an affidavit in the proof of claim that he first had knowledge of Nagel's misappropriation on March 4, 1922; that there is no allegation of waiver of notice in the declaration, and there is nothing in the proof that shows a waiver; that March notified Maxwell-Gillie & Company, March 6, 1922, and again on March 10, 1922, which letter came into possession of appellant on March 13, 1922, and a few days later the attorney for appellant was on the ground; that where notice different from that provided in the policy is relied on, it must be shown that appellant's rights were not in any manner affected thereby; that ten days elapsed from March 4, 1922, before a representative was on the ground; that it is admitted that appellant should find it necessary after an audit of Nagel's books, on January 31, 1922, and a meeting of the board of directors, on January 23, 1922, to increase the bond to $10,000.00; that there is an interesting

under these facts that appellee instead of notifying appellant of the defalcation, took steps to protect itself against what it knew was going to happen; that when Hardin was asked with reference to the increase of the bond, he stated that the business of the Springfield agency was about uniform with other years, that if there was no increase in the business, it is difficult to understand why the bond should be increased; that as a matter of fact there was a decrease in the business about that time.

We do not think these contentions of appellant are warranted by the evidence. Engel's books were audited by appellee on January 1, 1922, but it is not claimed that this audit revealed any embezzlement. The only way such a fact could be ascertained would be by an investigation of each account on the books and an interview with each debtor. Hardin immediately began an examination of the account of Engel. He found Engel was handling between $85,000.00 and $100,000.00 worth of appellee's money each year with a bond of only $5000.00. He recommended that the bond be increased, which was done, dating from February 1, 1922. It is only by inference that it can be claimed this increase was for an improper motive. It is just as reasonable to suppose it was done for purely business reasons. We do not think the evidence sustains the contention of appellant that there was any improper motive in such increase. Hardin from his investigation of Engel's accounts found that many of them were long past due, he immediately wrote to Engel about them and received a promise to collect the accounts by the end of the month. When the accounts were not collected as agreed, on March 1, Hardin sent notices to the delinquent customers without the knowledge of Engel. When this letter was sent out Engel knew his shortage was certain to be discovered, and on March 4, he went to Peoria to have a talk with Hardin, in which he admitted irregularities in his books, and that he was short. He did not admit that the shortage was due to any criminal act on his part, but said he had run behind in his accounts because of negligence; that his books

were in confusion, and he had in some instances allowed greater credits than he should have allowed, and that some overpayments were therefore entitled to credits which did not appear on the books. He did not at any time give the appellee any intimation that he had been in any way dishonest, but on the contrary, he claimed they were mere irregularities. As a result of this conference, Martin became suspicious that something was wrong, but he had no positive proof of any criminal acts. In National Surety Company vs. Western Pacific Railway Co., 230 Fed. 576, it was held that the employer is not required to give the surety notice upon the discovery of facts that would merely raise a suspicion of fraud or culpable negligence on the part of the employee; that the employer has the right to wait until it discovered facts justifying a careful and prudent man in charging another with fraud or culpable negligence. To the same effect is Aetna Indemnity Company vs. Grove Coal & Mining Company, 156 Fed. 562. As soon as his suspicions were aroused, Martin, on March 6, notified the former sureties of appellant, with whom the insurance had been secured, that something was wrong with the Springfield agency. He also employed auditors to investigate the books. Up to March 10 a shortage of $1400.00 had been discovered in thirty-six accounts, and on that day, Martin wrote to the sureties, stating among other things, "Up to the time of this writing we find thirty-six accounts incorrect, apparently collected by him, totaling approximately $1400.00, but until further investigation we will be unable to give you the total amount. We are satisfied that the above figures will not cover the shortage. In order that we may be fully protected under our bond we have notified you upon receipt of evidence just discovered. Please furnish us with any instructions you desire to give in this matter, and we will give all the assistance possible." This letter was forwarded to appellant on March 13. Almost immediately an attorney representing appellant appeared on the scene, and the trial was abandoned until it should be ascertained

of $6724.29, when, on March 21, a letter was sent to appellant at Hartford, Connecticut, stating the facts with reference to the audit, and on April 25, proof of loss was made. It is true this proof of loss states that knowledge of this misappropriation first came to appellee on March 4, 1922, but when this statement is considered in the light of all the facts we do not think the statement was untrue or that appellant was misled thereby. When all this evidence is considered as a whole, we conclude that the bond was not increased for the purpose of defrauding the appellant; that the notice given on March 21, was in substantial compliance with the fourth clause of the bond; that the suit was begun on September 20, 1922, which was within six months of the discovery of the shortage and the notice to appellant; that the right of recovery cannot be defeated on account of the failure to comply with these conditions of the bond.

The second condition of the bond provided "the employer shall not have made to the surety any untrue statements concerning any employee or his duties or accounts, or the manner in which the employer conducts his business." Appellant contends that this provision was not complied with for the reason that in the answer to the thirteenth interrogatory in the application, Engel stated he was "to receive a commission of fifteen per cent on all sales, $100.00 and commission." Whereas, he was not to receive fifteen per cent; that the eighteenth interrogatory was "Give amount of your debts other than liens on property", and this question was not answered but was left blank; that there may be some question as to whether the answer of Engel to interrogatory twenty-four wherein he stated that he had never been in arrears or in default in his present or any previous employment, was a false representation because the manner of conducting the business prior to October 1, 1916, technically could not be designated as an employment, but it is claimed that Thomas, who was the president of appellee at the time the application was made, certified that

of $6724.20, when, on March 21, a letter was sent to appellant at Hartford, Connecticut, stating the facts with reference to the audit, and on April 22, proof of loss was made. It is true this proof of loss states that knowledge of this misappropriation first came to appellee on March 4, 1922, but when this statement is considered in the light of all the facts we do not think the statement was under it that appellant was misled thereby.

All this evidence is considered as a whole, we conclude that the bond was not increased for the purpose of determining the appellant; that the notice given on March 21, was in substantial compliance with the fourth clause of the bond; that the audit was begun on September 20, 1922, which was within six months of the discovery of the shortage and the notice to appellant; that the right of recovery cannot be defeated on account of the failure to comply with these conditions of the bond.

The second condition of the bond provided "the employer shall not have made to the surety any untrue statements concerning any employee or his duties or accounts, or the manner in which the employer conducts his business." Appellant contends that this provision was not complied with for the reason that in the answer to the thirteenth interrogatory in the application, Engel stated he was "to receive a commission of fifteen per cent on all sales, $100.00 and commission." Thereon, he was not to receive fifteen per cent; that the eighteenth interrogatory was "Give amount of debts other than liens on property", and this question was not answered but was left blank; that there may be some question as to whether the answer of Engel to interrogatory twenty-four wherein he stated that he had never been in arrears on his duties in his present or any previous employment, was a false representation because the manner of conducting the business prior to October 1, 1920, tentatively could not be described as a "arrangement", but it is claimed that Thomas, who was the president of appellee at the time the application was made, testified that

these answers of Engel were true, and that Engel was not at present in arrears or in default, and that this answer made by Thomas was untrue.

We do not see how the statement of Engel with reference to the commission received by him in any way deceived, misled or injured appellant. By his contract of October 1, 1916, he was to receive twelve and one-half per cent on net sales. This was later changed to $100.00 and twelve and one-half per cent on all sales over $800.00. The answer to the thirteenth interrogatory is that his commission was fifteen per cent on all sales, $100.00 and commission. To say the least, this answer was indefinite and ambiguous. Certainly appellant could not tell from the answer whether the $100.00 was or was not a part of the fifteen per cent. If there was any uncertainty about this answer, and it was in any way material to the issuance of the bond, appellant should have called for an explanation. No explanation was asked and no explanation was given, and for that reason we conclude that appellant considered no explanation was necessary. Such an indefinite answer, after the bond has been issued, cannot be made the basis of relief from payment after a default has been made upon the bond. This is also true as to the failure to answer the eighteenth interrogatory. When the application was returned to appellant this question was not answered. If appellant wanted this question answered before issuing the bond, it should have returned the application for correction. It did not do so but issued the bond. It is in no position now to complain that the question was not answered. As we understand the contention of appellant, it is not claimed that the answer of Engel to the twenty-fourth interrogatory was not correct, but the complaint is that Thomas certified Engel had not been in arrears or in default in his present or any previous employment. The meaning of this answer depends entirely upon the sense in which the words "arrears" and "default" are used. Prior to October 1, 1916, Engel was indebted to appellee about $5000.00.

Iowa answers or model code item, and that Engel was not in default in arrears or in default, and that this answer made by Thomas was untrue.

We do not see how the statement of Engel with reference to the commission received by him in any way deceived, misled or injured appellant. By his contract of October 1, 1916, he was to receive twelve and one-half per cent on sales. This was later changed to $100.00 and twelve and one-half per cent on all sales over $800.00. The answer to the thirteenth interrogatory is what his commission was fifteen per cent on all sales, $100.00 and commission. To say its Iowa, this answer was immaterial and misleading. Probably any other model was well from the answer. Neither the $100.00 was or was not a part of the fifteen per cent. If there was any uncertainty about this answer, and it was in any way material to the issuance of the bond, appellant should have called for an explanation. No explanation was called and no explanation was given, and for that reason we conclude that appellant consented to explanation [illegible]. After the bond has been issued, cannot be made the basis of relief from payment after a default has been made upon the bond. This is also true as to the failure to answer the eighteenth interrogatory. When the application was returned to appellant this question was not answered. If appellant wanted this question answered before issuing the bond, it should have returned the application for correction. It did not do so but issued the bond. It is in no position now to complain that the question was not answered. If we multiply and the contention of appellant, it is not claimed that the answer of Engel to the twenty-fourth interrogatory was not correct, but the complaint is that Thomas certified Engel had not been in arrears or in default in his present or any previous employment. The meaning of this answer depends entirely upon the sense in which the words "arrears" and "default" are used. Prior to October 1, 1916, Engel was indebted to appellee about $3000.00.

The evidence shows he was conducting this business for himself, and this was a debt which he owed to appellee. It was not an amount of a default or an arrears, but was an amount due for goods sold and not paid for. The evidence shows this amount was due largely from the fact that he had sold goods and was unable to collect for them. He paid for these goods by cash and a note, and the note was subsequently settled. Engel's debt represented by this note, was not the result of a dishonest act on his part, nor was it the result of overdrafts permitted by the appellee. The language used in the twenty-fourth interrogatory must be interpreted in its plain, ordinary and popular sense to mean that the appellant was inquiring concerning the integrity of Engel, and not about his debt to the appellee or other employers. Appellant desired to know whether appellee considered Engel honest and trustworthy and that was the purpose of the twenty-fourth interrogatory. We do not think any of the statements or omissions in the application were sufficient to avoid this bond.

Complaint is made of the fifteenth, sixteenth, eighteenth and nineteenth instructions given on behalf of appellee. We have examined each of these instructions and find no error in any of them which would justify a reversal of this judgment and we do not deem it necessary to consider them in detail.

For the reasons indicated the judgment will be affirmed.

Judgment affirmed.

The evidence shows he was conducting this business for himself, and this was a debt which he owed to appellee. It was not an amount of a default or an arrears, but was an amount due for goods sold and not paid for. The evidence shows this amount was due largely from the fact that he had sold goods and was unable to collect for them. He paid for these goods by each and a note, and the note was subsequently settled. Engel's debt represented by this note, was not the result of a dishonest act on his part, nor was it the result of overdrafts permitted by the appellee. The language used in the twenty-fourth interrogatory must be interpreted in its plain, ordinary and popular sense to mean that the appellant was inquiring concerning the integrity of Engel, and not about his debt to the appellee or other employers. Appellant testified in these shelves appellee's principal local bankers and businessmen and that was the purpose of the twenty-fourth interrogatory. We do not think any of the statements or omissions in the application were sufficient to avoid this bond.

Complaint is made of the fifteenth, sixteenth, eighteenth and nineteenth instructions given on behalf of appellee. We have examined each of these instructions and find no error in any of them which would justify a reversal of this judgment and we do not deem it necessary to consider them in detail.

For the reasons indicated the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four,

Justus L. Johnson

Clerk of the Appellate Court.

3997

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 624

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois.
Appellee.

vs.

Alcon Rosenweig, Appellant.

Appeal from the County Court of Bureau County.

Partlow, J.

This is an appeal from an order of the county court of Bureau county committing the appellant, Alcon Rosenweig, to the county jail for contempt of court for his failure to pay $225 for the support of his wife. Considerable evidence was taken on the hearing and all of the errors assigned can only be determined from a bill of exceptions. A bill of exceptions was presented to the trial judge but it was not signed by him. On account of there being no bill of exceptions these alleged errors cannot be reviewed by this court and the judgment will be affirmed. Stein vs. Treager, 207 Ill. App. 122.

Judgment Affirmed.

The People of the State of Illinois,
Appellee.

vs.

Appeal from the County

Alson Rosenwald, Appellant.

Court of Bureau County.

Martin, J.

This is an appeal from an order of the county court of Bureau county committing the appellant, Alson Rosenwald, to the county jail for contempt of court for his failure to pay $325 for the support of his wife. Considerable evidence was taken on the hearing and all of the errors assigned can only be determined from a bill of exceptions. A bill of exceptions was presented to the trial judge but it was not signed by him. On account of there being no bill of exceptions these alleged errors cannot be reviewed by this court and the judgment will be affirmed. Stein vs. Treasner, 207 Ill. App. 128.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

3998a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Barbara Jacksa, Administratrix, Defendant in Error vs. James C. Davis, Agent in Charge of Transportation operating the Chicago Rock Island & Pacific Railway Company. Plaintiff in Error,	235 I.A. 624 Writ of Error to the Circuit Court of Will County.

Partlow, J.

Defendant in error, Barbara Jacksa, as administratrix of the estate of Martin Jacksa, deceased, recovered a judgment of $5000.00 in the circuit court of Will county against plaintiff in error, James C. Davis, Agent in Charge of Transportation operating the Chicago, Rock Island & Pacific Railway Company, on account of the death of Martin Jacksa, and a writ of error had been prosecuted from this court to review the judgment.

The sole errors urged are that the evidence does not establish the negligence charged in the declaration, and that the deceased was not in the exercise of due care. The declaration consisted of four counts. The first count charged negligence generally in the management and operation of the train. The second charged that obstructions were permitted to remain at or near the crossing which prevented a clear view of the tracks. The third charged the operation of the train at a high and dangerous rate of speed. The fourth charged the failure to give the signals required by statute. To the declaration the general issue was filed.

The evidence shows that the deceased, Martin Jacksa, was employed by the Citizen's Brewing Company, of Joliet, in delivering beer and other bottled drinks in Joliet and in the village of Rockdale, which in on the Rock Island Railroad about two miles south and west of Joliet. The deliveries were made in a large truck with a right hand drive which was operated by Jacksa. There was no cab on the truck and it was without side curtains, wind shield, or doors. On October 25, 1919 Jacksa

Martha Jones, Administratrix,

Defendant in Error

vs.

James C. Davis, Agent in Charge of Transportation operating the Chicago Rock Island & Pacific Railway Company,

Plaintiff in Error,

Partlow, J.

Defendant in error, Martha Jones, as administratrix of the estate of Martin Jones, deceased, recovered a judgment of $2000.00 in the circuit court of Will county against plaintiff in error, James C. Davis, Agent in Charge of Transportation operating the Chicago, Rock Island & Pacific Railway Company, on account of the death of Martin Jones, and a writ of error had been prosecuted from this court to review the judgment.

The sole errors urged are that the evidence does not establish the negligence charged in the declaration, and that the deceased was not in the exercise of due care. The declaration consisted of four counts. The first count charged negligence generally in the management and operation of the train. The second charged that obstructions were permitted to remain at or near the crossing which prevented a clear view of the tracks. The third charged the operation of the train at a high and dangerous rate of speed. The fourth charged the failure to give the signals required by statute. To the declaration the general issue was filed.

The evidence shows that the deceased, Martin Jones, was employed by the Citizen's Brewing Company, of Joliet, in delivering beer and other bottled drinks in Joliet and in the village of Rockdale, which lies on the Rock Island Railroad about two miles north and west of Joliet. The deliveries were made in a large truck with a right hand drive which was operated by Jones. There was no cab on the truck and it was without side curtains, windshield, or doors. On October 23, 1919 Jones

left the brewery about eight o'clock in the morning with a load of bottled beer and other bottled drinks. Fred Witty went with him as a helper and sat on the left hand side. They went south and west along Bluff street, which was parallel with the Rock Island tracks, until they reached Brandon road, where they turned north, crossing the Rock Island tracks, and then turned west on Moen avenue, and drove a few hundred feet into Rockdale. They were in Rockdale two or three hours making deliveries to twelve of fifteen saloons, they then loaded the truck with cases of empty bottles, and a little after eleven o'clock started back to Joliet. They drove east along Moen avenue to Brandon road, and turned south to cross the tracks. They made a round turn to the right beginning about sixty feet from the tracks, and without shifting gears, drove onto the tracks at about six miles per hour. Just as the front wheels got on the rail Witty looked to the left or east, saw the train coming, jumped out, ran back a few feet, and had barely cleared the truck when it was struck by a passenger train going west. The truck was completely demolished and Jacksa was killed. The passenger train which struck the truck was known as the Rocky Mountain limited. It left the La Salle street station, in Chicago, at 10:05 A. M., and was due at Joliet, forty miles distant, at 11:05, but on this morning was two or three minutes late at Joliet. There were no regular stops between Englewood and Moline, except to pick up passengers for Colorado Springs and other western points, and to take coal and water. On this day no stop was made after leaving Englewood until the truck was struck. At Joliet the Rock Island tracks cross the tracks of other railroads, and the train slowed down to about twenty miles per hour in making these crossings. After leaving Joliet the tracks curve to the west and south to a point about 1250 feet east of Brandon road, where they turned to the west and crossed the road at right angles. At Rockdale there is a water tank and coal chute about 1300 feet west of Brandon road. The train was to stop at Rockdale water tank to take water. The engineer was slowing down before he reached Rockdale

left the brewery about eight o'clock in the morning with a load of bottled beer and other bottled drinks. Red Kitty went with him as a helper and sat on the left hand side. They went south and west along Bluff street, which was parallel with the Moon Island tracks, until they reached Brandon road, where they turned north, crossing the Moon Island tracks, and then turned west on Moon avenue, and drove a few hundred feet into Roselawn. They were in Roselawn two or three hours making deliveries to twelve or fifteen saloons, they then loaded the truck with cases of empty bottles, and a little after eleven o'clock started back to Joliet. They drove east along Moon avenue to Brandon road, and turned south to cross the tracks. They made a round turn to the right beginning about sixty feet from the tracks, and without shifting gears, drove onto the tracks at about six miles per hour. Just as the front wheels got on the rail Kitty looked to the left or east, saw the train coming, jumped out, ran back a few feet, and had barely cleared the track when it was struck by a passenger train going west. The truck was completely demolished and Jackes was killed. The passenger train which struck the truck was known as the Rocky Mountain Limited. It left the La Salle street station, in Chicago, at 10:00 A. M., and was due at Joliet, forty miles distant, at 11:05, but on this morning was two or three minutes late at Joliet. There were no regular stops between Hinsdale and Joliet, except to pick up passengers for Colorado Springs and other western points, and to take coal and water. On this day no stop was made after leaving Hinsdale until the track was struck. At Joliet the Moon Island tracks cross the tracks of other railroads, and the train slowed down to about twenty miles per hour in making these crossings. After leaving Joliet the tracks curve to the west and south to a point about 1280 feet east of Brandon road, where they turned to the west and crossed the road at right angles. At Hinsdale there is a water tank and coaling chute about 1800 feet west of Brandon road. The train was to stop at Hinsdale water tank to take water. The engineer was allowed [illegible]

so he might make the stop at the water tank. When the engineer saw the truck he put on the emergency brake and brought the train to a stop with the end of the last coach opposite the truck, about 40 feet over the planking on the crossing. The train consisted of an engine and nine cars weighing about 700 tons, and it was about 630 feet long. When it came to a stop the engine was about one train length from the coal chute and water tank. The cow catcher on the right side of the engine was slightly damaged but the main damage was the breaking off of the blow-off valve on the right side, which resulted in letting the steam and water out of the boiler so the fire had to be pulled to prevent the boiler from burning.

There is very little evidence to sustain the charge in the second count that the plaintiff in error permitted obstructions to remain near the crossing, which prevented the deceased from looking down the track. Sixteen photographs of the crossing were admitted in evidence. These views were taken from different positions and show the crossing and all of its surroundings. It is apparent from these photohraphs and the other evidence in the case that there was very little, if any, obstruction between the crossing and the curve which was 1250 feet east of the crossing. There were some telegraph poles on the north side of the right of way east of the crossing. Some trees and bushes appear in the photographs, but the evidence showed that these trees are over 56 feet from the north rail, and that the north fence on the right of way is almost 35 feet from the north rail.

The place of the accident was not within the limits of any incorporated city or village, so that the speed of the train, as charged in the third count, could not alone and of itself, constitute negligence, Chicago, Rock Island & Pacific Railway Company vs. Givens, 18 Ill. App. 404; Chicago, Burlington & Quincy Railroad Company vs. Lee, 68 Ill. 576, except that the speed of the train must be consistent with the safety of the traveling public. Bartlow vs. Illinois Central Railroad Company, 150 Ill. 321.

so he might take the step of the water tank. When the engineer saw the train he put on the emergency brake and brought the train to a stop with the end of the last coach opposite the track, about 40 feet over the planking on the crossing. The train consisted of an engine and nine cars weighing about 700 tons, and it was about 650 feet long. When it came to a stop the engine was about one train length from the coal chute and water tank. The cow catcher on the right side of the engine was slightly damaged but the main damage was the breaking off of the blow-off valve on the right side, which resulted in letting the steam and water out of the boiler so the fire had to be pulled to prevent the boiler from burning.

There is very little evidence to sustain the charge in the second count that the plaintiff in error permitted obstructions to remain near the crossing, which prevented the deceased from looking down the track. Sixteen photographs of the crossing were admitted in evidence. These views were taken from different positions and show the crossing and all of its surroundings. It is apparent from these photographs and the other evidence in the case that there was very little, if any, obstruction between the crossing and the curve which was 1880 feet east of the crossing. There were some telegraph poles on the north side of the right of way east of the crossing. Some trees and bushes appear in the photographs, but the evidence showed that these trees are over 55 feet from the north rail, and that the north fence on the right of way is almost 55 feet from the north rail.

The place of the accident was not within the limits of any incorporated city or village, so that the speed of the train, as charged in the third count, could not alone and of itself, constitute negligence. Chicago, Rock Island & Pacific Railway Co. v. Grimes, 18 Ill. App. 422; Chicago, Burlington & Quincy Railroad Company v. Lee, 68 Ill. 576, concede that the speed of the train must be considered with the locality of the crossing in determining the question of negligence.

So the only charge of negligence upon which the judgment can be sustained must be the first count charging general negligence, and the fourth count charging a failure to give the signals required by statute, together with the speed of the train.

Five witnesses for defendant in error testified to facts material to the charge of negligence, namely, Mary Chelini, Howard Gierich, Felix Wisnoski, Peter Drust, and Fred Witty. Mrs. Chelini was upstairs in the east part of her house which was north and west of the crossing. She did not see nor hear the train until it struck the truck. She testified she did not hear a bell or whistle. Gierich was in a Ford truck on the south side of the crossing waiting for Jacksa to cross. When he reached the crossin on the south side he stopped his truck but the engine was running and the cutout was open. He testified that after he stopped he looked both ways but did not see the train. He looked down when he closed the cutout and had to kick it twice before it closed, but his engine was running all the time. Almost immediately the train struck the truck. He heard no whistle or bell. He testified the train was going 40 to 45 miles per hour. Later he said he was almost positive it was going faster than 30 miles per hour; that it was a fair, bright, clear day. Wisnoski and Drust were on Moen avenue, from 20 to 50 feet from Jacksa's truck, waiting for a street car to go to Joliet. The former testified he saw the train 30 or 35 feet from the crossing and heard no bell or whistle. He laster said the bell was ringing when the train passed him. Drust testified the train was two blocks away when he first saw it. Later he said it was half a block away. He testified he heard no bell. Witty testified he heard no bell or whistle and did not hear the train until they were on the tracks; that it was going 40 to 45 miles per hour. He was considerably confused as to whether he testified before the coroner but finally admitted that at the inquest he said he had no ideas as to the rate of speed of the train; that he told the coroner he did not believe Jacksa was looking

So the only charge of negligence upon which the judgment can be sustained must be the first count charging general negligence, and the fourth count charging a failure to give the signals required by statute, together with the speed of the train.

Five witnesses for defendant in error testified to facts material to the charge of negligence, namely, Mary Chelini, Howard Clarke, Julia Clement, Alice Swan, [illegible], Mrs. [illegible]. Mrs. [illegible] was westbound in the east part of her house which was north and west of the crossing. She did not see nor hear the train until it struck the truck. She testified she did not hear a bell or whistle. Clarke was in a Ford truck on the south side of the crossing waiting for Jenkins to cross. When he reached the crossing on the south side he stopped his truck but the engine was running and the output was open. He testified that after he stopped he looked both ways but did not see the train. He looked [illegible] it closed, but his engine was running all the time. Almost immediately the train struck the truck. He heard no whistle or bell. He testified the train was going 40 to 45 miles per hour. Later he said he was almost positive it was going faster than 30 miles per hour. Swan testified that it was a fair, bright, clear day. Wimmenhl and Dwyer were on Moen avenue, from 20 to 30 feet from Jenkins's truck, waiting for a street car to go to Joliet. The former testified he saw the train 50 or 35 feet from the crossing and heard no bell or whistle. Mr. Dwyer said the bell was ringing when the train passed him. Dwyer testified the train was two blocks away when he first saw it. Later he said it was half a block away. He testified he heard no bell. Mrs. Clement testified he heard no bell or whistle and did not hear the train until they were on the trucks; that it was going 40 or 45 miles per hour. He was considerably confused as to whether he testified before the coroner but finally admitted that at the [illegible] he said he had no idea as to the rate of speed of the train; that he told the coroner he did not believe Jenkins was looking

at all.

On behalf of the plaintiff in error, the engineer testified he intended to stop at Rockdale for water, that he stopped there regularly; that after leaving Joliet, he ran about 25 miles an hour until he reached the curve, 1250 feet east of the crossing. He then applied the air, blew the double crossing whistle twice long and twice short and then repeated it. He testified that the engine was equipped with a standard bell operated by air, the bell was set to ringing in Chicago and was not turned off until after the collision; that after the collision the train ran ten car lengths before it was stopped and the bell was ringing when it came to a stop; that at the time the train struck the automobile it was going 20 or 25 miles per hour; that if it had been going 40 miles per hour it would have been impossible to have stopped within twice the distance; that after he got around the curve he had a view down the track, but he first noticed the automobile when he was right onto it. The time card called for an average of 44½ miles speed between Moline and Chicago. The train could make the time because it did not make any stops rather than because it was going at a high rate of speed. As to the rate of speed, the ringing of the bell, and the blowing of the whistle, the engineer is corroborated by the fireman. Frank C. Lynch, a passenger on the train, testified he was in the wash room just prior to the collision. He heard the whistle and then the emergency brake was applied; that the whistle sounded at two different intervals, once for the crossing and once for the station. Ray Marvin, an express messenger, testified the train made a sudden stop and he heard a whistle blown just before that time. It blew several times, enough to attract his attention and he knew something was wrong.

As to the rate of speed it is apparent that this train was traveling at a considerable rate of speed. It was a transcontinental train, and was required to make an average of 44½ miles per hour. Of necessity a part of the time it would be compelled to travel at a higher rate and at other times to travel at a lower

at all.

On behalf of the plaintiff in error, the engineer testified he intended to stop at Joliet for water, that he stopped there regularly; that after leaving Joliet, he ran about 20 miles an hour until he reached the curve, 1250 feet east of the crossing. He then applied the air, blew the double crossing whistle twice long and twice short and then reopened it. He testified that the engine was equipped with a standard bell operated by air, the bell was set to ringing in Chicago and was not turned off until after the collision; that after the collision the train ran ten or twelve lengths before it was stopped and the bell was ringing when it came to a stop; that at the time the train struck the automobile it was going 20 or 25 miles per hour; that if it had been going 40 miles per hour it would have been impossible to have stopped within twice the distance; that after he got around the curve he had a view down the track, but he first noticed the automobile when he was right onto it. The time card called for an average of [illegible] miles per hour. [illegible]

The time became it did not make any stops rather than because it was going at a high rate of speed. As to the rate of speed, the ringing of the bell, and the blowing of the whistle, the engineer is corroborated by the fireman. Frank G. Lynch, a passenger on the train, testified he was in the smoke room just prior to the collision. He heard the whistle and then the emergency brake was applied; that the whistle sounded at two different intervals, once for the crossing and once for the station. Jay Marvin, an express messenger, testified the train made a sudden stop and he heard a whistle blown just before that time. It blew several times, enough to attract his attention and he looked [illegible]

As to the rate of speed it is apparent that this train was traveling at a considerable rate of speed. It was a transcontinental train, and was required to make an average of [illegible] per hour. Of necessity a part of the time it had to accomplish to travel at a higher rate and at other times to travel at a lower

rate than the average. There is only one circumstance which indicated that at the time of the accident it was traveling under its average rate of speed, and that is, that it was going to take water at Rockdale, which was only a half a mile from the curve and 1300 feet from the crossing. In order to make a stop within the half mile it is probable that the engineer would be compelled to slow down before he reached the crossing. It is not material, however, whether the train was running 25 miles per hour or 45 miles per hour. There was no limit prescribed by law as to the rate of speed. The only question was whether the train was traveling at such a speed as was reasonable, having regard for the rights of persons who were required to cross at this point. Whether the rate of speed was excessive was a question of fact for the jury.

On the question whether any signal was given as required by law, if the testimony of the engineer and fireman is to be believed, the bell was started ringing in Chicago and continued to ring until the truck was struck. The statute does not require that a bell be rung and a whistle sounded but it requires that a bell should be rung or a whistle sounded at least eighty rods from the crossing. The witness Wisnoski testified in corroboration of the engineer and fireman that when the train passed him the bell was ringing, and other witnesses testified it was rung after the train was stopped. The engineer and fireman both testified that a whistle was sounded for the crossing. The engineer states that two warnings were given. In this he is corroborated by other witnesses. The defendant in error claims this whistle was not sounded in accordance with the statute for the reason that according to the testimony of the engineer it was sounded at the curve, which was 1250 feet east of the crossing, and that this was not at least eighty rods from the crossing as provided by the statute therefore there was no compliance with the statute, Whether a bell was rung or a whistle was sounded, how many times it was sounded, and just where the train was at the time it was sounded, were also questions of fact for the jury.

The defendant in error claims the train was negligently

rate than the average. There is only one circumstance which indicated that at the time of the accident it was travelling under its average rate of speed, and that is, that it was going to take water at Hoodale, which was only a half a mile from the curve and 1200 feet from the crossing. In order to make a stop within the half mile it is probable that the engineer would be compelled to slow down before he reached the crossing. It is not material, however, whether the train was running 35 miles per hour or 45 miles per hour. There was no limit prescribed by law as to the rate of speed. The only question was whether the train was travelling at such a speed as was reasonable, having regard for the rights of persons who were required to cross at this point. Whether the rate of speed was excessive was a question of fact for the jury.

On the question whether any signal was given as required by law, if the testimony of the engineer and fireman is to be believed, the bell was started ringing in Chicago and continued to ring until the train was struck. The statute does not require that a bell be rung and a whistle sounded but it requires that a bell should be rung or a whistle sounded at least eighty rods from the crossing. The witness Simonski testified in corroboration of the engineer and fireman that when the train passed him the bell was ringing, and other witnesses testified it was rung after the train stopped. The engineer and fireman both testified that a whistle was sounded for the crossing. The engineer states that two warnings were given. In this he is corroborated by other witnesses. The defendant in error claims this whistle was not sounded in accordance with the statute for the reason that according to the testimony of the engineer it was sounded at the curve, which was 1250 feet east of the crossing, and that this was not at least eighty rods from the crossing as provided by the statute; therefore there was no compliance with the statute. Whether a bell was rung or a whistle was sounded, how many times it was sounded, and just where the train was at the time it was sounded, were also questions of fact for the jury.

The defendant in error claims the train was negligently

handled for the reason that according to the testimony of the engineer, he did not see the automobile until he was right on it, and he did not have time to stop before striking it. There is some question under the evidence just where the engine was when the engineer first saw deceased. Whether plaintiff in error was guilty of general negligence, was also a question of fact for the jury.

We are not disposed to disturb this verdict on the ground that the acts of negligence charged in the declaration are not sustained by the weight of the evidence. If the jury believed the witnesses who testified for the defendant in error, they were justified in finding that the plaintiff in error was guilty of some of the acts of negligence as charged in the declaration.

Even if it be conceded that plaintiff in error was guilty of some of the charges of negligence as alleged in the declaration, that fact would not be sufficient to justify a verdict against plaintiff in error unless the defendant in error also proved by the preponderance of the evidence that the defendant in error was in the exercise of due care and caution for his own safety. In our opinion this judgment must stand or fall entirely upon that question. At the time of the accident the deceased was 53 years old. His hearing and eyesight were good. He was an experienced truck driver and had handled this truck on many occasions. There was nothing about the front part of the truck in the way of curtains or wind shield which would in any way obstruct his view either to the front or either side. The day was bright and clear. As he drove east on Moen avenue out of Rockdale, he was parallel with the tracks of the railroad and could look straight east down the track. When he came up to the crossing there was nothing to obstruct his view to the front. He was familiar with this crossing and its surroundings. He had crossed it on many occasions, the last time just a few hours before the accident. The photographs show that it is not a blind crossing as claimed by the defendant in error, but it has very

handled for the reason that according to the testimony of the engineer, he did not see the automobile until he was right on it, and he did not have time to stop before striking it. There is some question under the evidence just where the engine was when the engineer first saw deceased. Another plaintiff in error was guilty of general negligence, was also a question of fact for the jury.

We are not disposed to disturb this verdict on the ground that the acts of negligence charged in the declaration are not sustained by the weight of the evidence. If the jury believed the witnesses who testified for the defendant in error, they were justified in finding that the plaintiff in error was guilty of some of the acts of negligence as charged in the declaration.

Even if it be conceded that plaintiff in error was guilty of some of the charges of negligence as alleged in the declaration, that fact would not be sufficient to justify a verdict against plaintiff in error unless the testimony also proved by the preponderance of the evidence that the defendant in error was in the exercise of due care and caution for his own safety. In our opinion this judgment must stand or fall entirely upon that question. At the time of the accident the deceased was 64 years old. His hearing and eyesight were good. He was an experienced [illegible] in handling this truck on many occasions. There was nothing about the front part of the truck in the way of curtains or wind shield which would in any way obstruct his view either to the front or either side. The day was bright and clear. As he drove east on Moon avenue out of Rockdale, he was parallel with the tracks of the railroad and could look straight east down the track. When he came up to the crossing there was nothing to obstruct his view to the front. He was familiar with this crossing and its surroundings. He had crossed it on many occasions, the last time just a few hours before the accident. The photographs show that it is not a blind crossing as claimed by the defendant in error, but it has very

few, if any, obstructions. In fact, there is very little, if any, evidence showing obstructions of any kind. There are some trees and bushes on the north side of the right of way east of the crossing but these are over 56 feet north of the north rail. The photographs show a clear and unobstructed view. The evidence offered by plaintiff in error shows that from a point sixty feet north from the tracks on the crossing there was an unobstructed view of 320 feet down the track, fifty feet from the track there was an unobstructed view of 745 feet down the track, and forty feet from the tracks there was an unobstructed view of 1050 feet. If a bell or whistle has been sounded there would be no excuse for the defendant in error not seeing this train. Even if no bell or whistle had been sounded, a train traveling at the rate of speed this one was going, would of necessity make considerable noise, sufficient to have attracted the attention of the deceased. We know of no reason why the deceased should not have looked and seen this train. His attention might have been detracted by something which does not appear from the evidence. The engine on his truck was running, and the bottles in the back of the truck may have been making some noise which prevented him from hearing the train, but under all these conditions it was his duty to exercise reasonable care for his own safety, and the greater the noise, the greater the care he should have exercised. It has been held in many cases that a railroad crossing is a well known place of danger, and when a person is crossing it he should exercise and use all of his faculties for his own personal safety. We do not think the evidence in this case establishes that the deceased was in the exercise of due care and caution at the time he was struck. The finding of the jury that he was in the exercise of due care and caution is contrary to the weight of the evidence, and for this reason the judgment will be reversed and the cause remanded.

Reversed and Remanded.

few, if any, obstructions. In fact, there is very little, if any, evidence about any obstructions of any kind. There are some trees and bushes on the north side of the road of very most of the crossing but there are over 25 feet north of the north rail. The photographs show a clear and unobstructed view. The evidence offered by a trained in error shows that from a point sixty feet north from the tracks on the crossing there was an unobstructed view of 350 feet down the track sixty feet from the track there was an unobstructed view of 748 feet down the track, and forty feet from the tracks there was an unobstructed view of 1050 feet. If a train or vehicle has been crossed there would be no excuse for the defendant in error not seeing this train. Even if no bell or whistle had been sounded, a train traveling at the rate of speed this one was going, would of necessity make considerable noise, particularly to the attention of the deceased. We know of no reason why the deceased should not have looked and seen this train. His attention might have been distracted by something which does not appear from the evidence. The engine on his train was running, and the bottles in the back of the train may have been making some noise which prevented him from hearing the train, but under all these conditions it was his duty to exercise reasonable care for his own safety, and the greater the noise, the greater the care he should have exercised. It has been held in many cases that a railroad crossing is a well known place of danger, and when a person is crossing it he should exercise and use all of his faculties for his own personal safety. We do not think the evidence in this case establishes that the deceased was in the exercise of due care and caution at the time he was struck. The finding of the jury that he was in the exercise of due care and caution is contrary to the weight of the evidence, and for this reason the judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson

Clerk of the Appellate Court.

Rehearing Denied
Oct 8, 1924.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 24 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Leon D. Hofer, Appellee, vs. Chicago, Burlington & Quincy Railroad Company, a corporation, Appellant.	)	235 I.A. 624 Appeal from the Circuit Court of Peoria County.

Partlow, J.

Appellee, Leon D. Hofer, began suit in the circuit court of Peoria county against appellant, Chicago, Burlington & Quincy Railroad Company, to recover damages for personal injuries. There have been two trials. Upon the first trial the jury disagreed. Upon the second trial the jury returned a verdict in favor of appellee for $4500.00. Judgment was entered upon the verdict, and an appeal has been prosecuted to this court.

The accident happened about three o'clock on the afternoon of January 9, 1922, about two and one-half miles west of Pottstown, Peoria county, at what is commonly known as the Kingsley crossing. At this point the tracks of appellant extend due east and west, but just east of the crossing they curve in a southeasterly direction and cross a steel bridge with an overhead structure and girders, which is about a quarter of a mile east of the crossing and extends over Kickapoo creek. The right of way at the crossing is about sixty feet wide, and the tracks are six or eight feet above the surface of the surrounding land. This crossing was established many years ago, probably as a farm crossing. South of the crossing there are about sixty acres of land belonging to the Kingsley farm. North of the right of way, and adjacent to it, is a public highway known as the Peoria & Southport road, which leads into the city of Peoria. North of this highway are other lands belonging to the Kingsley farm. On the north side of the right of way as was a gate leading into the highway, and on the south side was another gate leading into the Kingsley land.

No. 23514.

Appellee,

vs.

Chicago, Burlington & Quincy Railroad Company, a corporation,

Appellant.

Appeal from the Circuit Court of Peoria County.

Appellee, Leon E. Hoke, began suit in the circuit court of Peoria county against appellant, Chicago, Burlington & Quincy Railroad Company, to recover damages for personal injuries. There have been two trials. Upon the first trial the jury disagreed. Upon the second trial the jury returned a verdict in favor of appellee for $4500.00. Judgment was entered upon the verdict, and an appeal has been prosecuted to this court.

The accident happened about three o'clock on the afternoon of January 2, 1922, about two and one-half miles west of Kettstown, Peoria county, at what is commonly known as the Kingsley crossing. At this point the tracks of appellant extend due east and west, but just east of the crossing they curve in a southeasterly direction and cross a steel bridge with an overhead of trusses and girders, which is about a quarter of a mile east of the crossing and extends over Kickapoo creek. The right of way at the crossing is about sixty feet wide, and the tracks are six or eight feet above the surface of the surrounding land. This crossing was established many years ago, probably as a farm crossing. South of the crossing there are about sixty acres of land belonging to the Kingsley farm. North of the right of way, and adjacent to it, is a public highway known as the Peoria & Pontiac road, which leads into the city of Peoria. North of this highway, the other lands belonging to the Kingsley farm. On the north side of the right of way was a gate leading into the highway, and on the south side was another gate leading into the Kingsley land.

There were planks between the rails at the crossing so that vehicles could cross. There were five or six coal mines on land just south of the Kingsley sixty acres, including a mine owned by Wamsley and Rainer. Arrangements had been made by which coal was hauled from these mines across the Kingsley sixty acres, and over the Kingsley crossing onto the Peoria & Southport highway. These mines were also reached by a public road on the south side of Kickapoo creek, which road joined the Peoria & Southport road at Pottstown, two and one-half miles east of this crossing, About two years prior to the accident, a bridge was built across Kickapoo creek, near the mines, about sixty rods south of the railroad right of way. A private roadway made of cinders was built north across the Kingsley sixty acres, to the right of way of the railroad where it turned west and extended parallel to the railroad for about two hundred feet and ended at a gate on the south side of the Kingsley crossing. The road then turned north across the railroad tracks and connected with the Peoria & Southport road. To get from the Kingsley field onto the railroad crossing, Wamsley & Rainer had constructed, a couple of years prior to the accident, and inclined slope made of railroad ties, laid parallel with the track, end to end, and covered with cinders. The turn in this roadway from the west to the north, in order to get up on the tracks at the crossing began about ten feet inside of the field. The gate on the south side of the crossing was not parallel with the tracks but the west post was set back in the field. The gate was about midway of the turn, half of the turn being inside of the gate and the other half on the right of way. The gate opened to the west into the field against the right of way fence.

On the day of the accident, appellee, a man ~~thirty~~ thirty-nine years of age, owned a truck and was in business for himself. He bought a load of coal at the Wamsley & Rainer mine. He drove over the bridge across the creek, then over the road through the Kingsley farm in a northerly direction, tu-

there were planks between the rails at the crossing so that vehicles could cross. [illegible]

land just south of the Kingsley sixty acres, including a mine owned by Kingsley and others. Arrangements had been made by which coal was hauled from these mines across the Kingsley sixty acres, and over the Kingsley crossing into the tracks a Northport siding. These mines were also reached by a public road on the north side of Kishwaukee creek, which road joined the Peoria & Northport road at Robertson, two and one-half miles east of this crossing. About two years prior to the accident, [illegible] the mines, about sixty rods south of the railroad right of way. A private roadway made of cinders was built north across the Kingsley sixty acres, to the right of way of the railroad where it turned west and ran parallel to the railroad for about two hundred rods and ended at a gate in the south side of the Kingsley crossing. The road then turned north across the railroad tracks and connected with the Peoria & Northport road. To get from the Kingsley field onto the railroad crossing, Kingsley & Rainer had constructed, a couple of years prior to the accident, and inclined ridge made of railroad ties, laid parallel with the track, out to end, and covered with cinders. The turn in this roadway from the west to the north, in order to get up on the tracks at the crossing began about ten feet inside of the field. The gate on the south side of the crossing was not parallel with the tracks but the west post was set back in the field. The gate was about midway of the turn, half of the turn being inside of the gate and the other half on the right of way. The gate opened to the west into the field against the right of way fence.

On the day of the accident, appellee, a man [illegible] years of age, owned a truck and was in the habit of hauling coal. He bought a load of coal at the Kingsley [illegible] and drove over the bridge across the creek, then over the road through the Kingsley farm in a northerly direction, for

west at the right of way, and drove up to the gate on the South side of the crossing. He got out of the truck, opened the gate drove up the incline and was struck on the crossing by a passenger train which left the city of Peoria going west at three o'clock in the afternoon.

The declaration consists of two counts. The first count alleged that while appellee was in the exercise of due care and caution for his own safety, the appellant was operating one of its trains at a high and dangergus rate of speed without giving any warning of its approach; and while appellee was crossing the railroad, the locomotive ran into the truck in which appellee was riding, and he was thrown to the ground with great force and violence, and injured. It was alleged that the crossing was not a public highway but that it was a crossing which had been used extensively for five years, with the knowledge and consent of appellant, by a great many persons going to and from siad mines and other places across said railroada The second count is similar to the first, with the exception that it alleges general negligence, and charges that appellant so carelessly and negligently managed said train that it ran into and against the truck in which appellee was riding, with great force and violence, and he was injured. To the declaration, appellant filed the general issue.

No complaint is made of any ruling on evidence, or of any instruction given on behalf of the appellee. Appellant tendered fifteen instructions. Three were given, five were modified, and seven were refused. Error is assigned on all the refused instructions. The first instruction refused told the jury that the appellee was not only bound to prove the negligence charged, but he was also bound to prove reasonable care and diligence for his own safety, and unless such proof was made, the jury should find for the appellant. In another instruction given, the court told the jury that the appellee must prove by the greater weight of the evidence, first, that the

went at the right of way, and drove up to the gate on the south side of the crossing. He got out of the truck, opened the gate drove up the incline and was struck on the crossing by a passenger train which left the city of Peoria going west at three o'clock in the afternoon.

The declaration consists of two counts. The first count alleged that while appellee was in the exercise of due care and caution for his own safety, the appellant was operating one of its trains at a high and dangerous rate of speed without giving any warning of its approach; and while appellee was crossing the railroad, the locomotive ran into the truck in which appellee was riding, and he was thrown to the ground with great force and violence, and injured. It was alleged that the crossing was not a public highway but that it was a crossing which had been used extensively for five years, with the knowledge and consent of appellant, by a great many persons going to and from said mines and other places across said railroads. The second count is similar to the first, with the exception that it alleges negligence, and charges that appellant so carelessly and negligently managed said train that it ran into and against the truck in which appellee was riding, with great force and violence, and he was injured. To the declaration, appellant filed the general issue.

No complaint is made of any ruling on evidence, or of any instruction given on behalf of the appellee. Appellant tendered fifteen instructions. Three were given, five were modified, and seven were refused. Error is assigned on all the refused instructions. The first instruction ~~the~~ refused told the jury that the appellee was not only bound to prove the negligence charged, but he was also bound to prove reasonable care and diligence for his own safety, and unless such proof was made, the jury should find for the appellant. In another instruction given, the court told the jury that the evidence must prove by the greater weight of the evidence, first, that the

appellant was guilty of the negligence charged, second, that such negligence caused or contributed to the injury, and third, that the appellee was in the exercise of reasonable care and caution for his own safety, and if the evidence failed to prove any of these three elements, the jury should find the appellant not guilty. The first instruction refused is merely a repetition of the instruction above quoted, and there was no error in refusing the first instruction. The fourth refused instruction was covered by the second as modified. The fifth refused instruction told the jury that if both appellant and appellee were negligent, appellee could not recover. The seventh instruction given on behalf of appellant, after telling the jury what was necessary to constitute negligence, was as follows: "But even if you should believe that the defendant was guilty of negligence, still if you further believe from the evidence that plaintiff by his own negligence, carelessness, or fault, contributed to the injury, your verdict must be for the defendant." This instruction covered the entire proposition sought to be announced by the fourth refused instruction, in a more explicit and effective manner. The sixth and seventh refused instructions were covered by the second, third and fourth given. There was no error in refusing any of these instructions.

Appellant next insists that the place where the accident happened was a statutory farm crossing, made for the sole use and benefit of land owners on each side of the right of way; that the approaches and roads leading to it were constructed by the owners of the mines under arrangements with the land owners for the sole benefit of the owners of the mines; that appellee was at best a mere licensee, and the only duty appellant owed him was not to wantonly and willfully injure him; that for these reasons the court improperly refused the second and third instructions, which told the jury that the only duty appellant owed appellee was not to wantonly and willfully injure

appellant was guilty of the negligence charged, second, that such negligence caused or contributed to the injury, and third, that the appellee was in the exercise of reasonable care and caution for his own safety, and if the evidence failed to prove any of these three elements, the jury should find the appellant not guilty. The first instruction refused is merely a repetition of the instruction above quoted, and there was no error in refusing the first instruction. The fourth refused instruction was covered by the second as modified. The fifth refused instruction told the jury that if both appellant and appellee were negligent, appellee could not recover. The seventh instruction given on behalf of appellant, after telling the jury

"But even if you should believe that the defendant was guilty of negligence, still if you further believe from the evidence that plaintiff by his own negligence, carelessness, or fault, contributed to the injury, you verdict must be for the defendant."

to be announced by the fourth refused instruction, in a more explicit and effective manner. The sixth and seventh refused instructions were covered by the second, third and fourth given. There was no error in refusing any of these instructions.

Appellant next insists that the place where the accident happened was a statutory farm crossing, made for the use and that the approaches and roads leading to it were constructed by the owners of the mines under arrangements with the land owners for the sole benefit of the owners of the mines; that appellee has at best a mere license, and the only duty appellant owed him was not willfully or wantonly to injure him. For these reasons the court improperly refused the 4th and 5th instructions, which read as follows:

him.

We do not consider it necessary in order to properly determine the questions at issue in this case, to decide the exact legal status of this crossing, or whether appellee was a mere licensee, or had a greater right thereon. Nor do we think appellant is in any position to raise these questions on account of the instructions given in its behalf. There was no charge in the declaration of any wanton or willful injury, and only the general issue was filed. The declaration alleged that this crossing was not at a public highway but that it had been used for five years with the knowledge and consent of appellant. The second instruction given on behalf of the appellant told the jury that if they believed from the evidence that appellant, at and immediately prior to the time appellee was injured, used due care and caution in the operation of its trains for the protection of any one who might be using the crossing, then appellant cannot be charged with negligence, and should be found not guilty. The first instruction refused on behalf of appellant told the jury that the appellee could not recover unless he proved by a preponderance of the evidence, not only that the appellant was guilty of the negligence charged against it in the declaration, or some count thereof, but that the plaintiff was in the exercise of due care for his own safety. The second and third refused instructions contain the elements of a wanton and willful injury. If appellee was a mere licensee, and the only duty appellant owed him was not to wantonly and willfully injure him, then appellant should have asked the court to so instruct the jury, and the second instruction given, and the first instruction refused on behalf of appellant, should not have been tendered to the court. Appellant had the right to have the jury instructed upon its theory of the case, but it did not have the right under the pleadings to have the jury instructed upon both theories, and then assign error on the refusal to give the second and third instructions.

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We do not consider it necessary in order to properly determine the question at issue in this case, to decide the exact legal status of this crossing, or whether appellee was a mere licensee, or had a greater right thereon. Nor do we think appellant is in any position to raise that question on account of the instructions given in its behalf. There was no charge in the declaration of any wanton or willful injury, and only the general issue was filed. The declaration alleged that this crossing was not at a public highway but that it had been used for five years with the knowledge and consent of appellant. The second instruction given on behalf of the appellant told the jury that if they believed from the evidence that appellant, at and immediately prior to the time appellee was injured, used due care and caution in the operation of its trains for the protection of any one who might be using the crossing, then appellant cannot be charged with negligence, and should be found not guilty. The first instruction refused on behalf of appellant told the jury that the appellee could not recover unless he proved by a preponderance of the evidence, not only that the appellant was guilty of the negligence charged against it in the declaration, or some count thereof, but that the plaintiff was in the exercise of due care for his own safety. The second and third refused instructions contain the elements of a wanton and willful injury. If appellee was a mere licensee, and the only duty appellant owed him was not to wantonly and willfully injure him, then appellant should have asked the court to so instruct the jury, and the second instruction given, and the first instruction refused on behalf of appellant, should not have been tendered to the court. Appellee had the right to have the jury instructed upon the theory of the case, but it did not have the right under the pleadings to have the jury instructed upon both theories, and then submit some of the refused to give the second and third instructions.

Appellant apparently adopted the theory that it was required to use due care not to injure the appellant, and for this reason it is in no position to ask this court to say that another rule was applicable.

The only questions remaining for consideration, are whether the appellant was guilty of the negligence charged, and whether appellee was in the exercise of due care and caution; The negligence charged is that appellant ran its train at a high and dangerous rate of speed, without giving any warning of its approach; together with a general charge of negligence. The train was going thirty-five to forty miles per hour, but the place of accident was not within the corporate limits of any village or city, therefore the rate of speed alone was not sufficient to constitute negligence. Chicago, Burlington and Quincy. R. R. Co. vs. Lee, 68 Ill. 576. This was not a public crossing, and for that reason appellant was not required, under Section 84, Chapter 114, of the statute, to ring the bell or sound the whistle. Wabash, St. Louis & Pacific Railroad vs. Niekirk, 15 Ill. App. 172; Chicago, & Alton R. R. Co. vs. Saunders, 154 Ill. 531. It was the duty of appellant to give reasonabley apprehended danger, and the means by which such notice is usually given is a bell or a whistle. Chicago & Alton R. R. Co. vs. Dillon, 123 Ill. 570; St. Louis National Stock Yards, vs. Brennan, 126 Ill. App. 601. The question whether appellant was guilty of the negligence charged was a a question of fact for the jury. Illinois Central Railroad Co. Vs. Jeringan, 198 Ill. 297; Rink vs. Southwestern Railway Co; 151 Ill. App. 429; Althoff vs. Illinois Central Railway Co; 227 Ill. App. 417.

The only negligence of appellant which the evidence tends to show is that no bell or whistle was sounded. Greason, the fireman, testified the bell had been ringing from the time the train left Pottstown until appellee was struck; that a ~~regular~~ regular

Appellant apparently adopts the theory that it was required to use due care not to injure the appellant, and for this reason it is in no position to ask this court to say that another rule was applicable.

The only questions remaining for consideration, are whether the appellant was guilty of the negligence so charged, and whether appellee was in the exercise of due care and caution; The negligence charged is that appellant ran its train at a high and dangerous rate of speed, without giving any warning of its approach; together with a general charge of negligence. The train was going thirty-five to forty miles per hour, but the place of accident was not within the corporate limits of any village or city, therefore the rate of speed alone was not sufficient to constitute negligence. Chicago, Burlington and Quincy, R. R. Co. vs. Lee, 88 Ill. 376. This was not a public crossing, and for that reason appellant was not required, under Section 84, Chapter 114, of the statute, to ring the bell or sound the whistle. Wabash, St. Louis & Pacific Railway Co. vs. Shacklet, 16 Ill. App. 174; Chicago, Rock Island & Pacific Ry. Co. vs. Saunders, 154 Ill. 521. It was the duty of appellant to give reasonably apprehended danger, and the means by which such notice is usually given is a bell or a whistle. Chicago & Alton R. R. Co. vs. Dillon, 123 Ill. 570; St. Louis National Stock Yards, vs. Brennan, 126 Ill. App. 601. The question whether appellant was guilty of the negligence charged was a question of fact for the jury. Illinois Central Railroad Co. vs. Ireland, 190 Ill. 497; Alton vs. Pennsylvania Railway Co; 151 Ill. App. 429; Pathuck vs. Illinois Central Railway Co; 227 Ill. App. 417.

The only negligence of appellant which the evidence tends to show is that no bell or whistle was sounded. Green, the fireman, testified the bell had been ringing from the time the train left Tolleston with special [illegible]

crossing whistle was sounded just as the train left the bridge a quarter of a mile east of the crossing. As to the whistle being sounded, Greason is corroborated by the conductor, express messenger, a signal supervisor, a telegraph lineman, and a coal miner, all of whom were on the train, and by Wireman, a truck driver, who was on the Peoria-Southport road, going east, 300 to 400 yards from the crossing. As to the ringing of the bell, Greason was corroborated by Rauch, who was on the road going across the Kingsley farm, by Wireman, and by Wesley Ayres, who was driving a truck east onthe Southport road about 160 feet west of the crossing. On the other hand appellee testified he heard no bell or whistle, and he is borroborated by five other witnesses. One of these was in the smoker on the train. One of them Backus, was riding in a truck across the ~~Kingsl~~ Kingsley farm, and three were in an automobile on the Peoria & Southport road, west of the corssing. The four were in trucks testified the engines of their trucks were running, were making some noise, and this might have prevented them from hearing a bell or whistle, even if one had been sounded. Rauch, who testified he heard the bell, was crossing the Kingsley farm and was close to Backus, who was also in a truck, and who testified he heard no bell or whistle. From all this conflicting evidence it is apparent that it was a very close question whether appellee established by a preponderance of the evidence, that no bell was rung or whistle sounded. However, if the rest of the evidence in the case established the liability of appellant as charged in the declaration, we would be very much inclined to say that it was a question of fact for the jury to determine whether the preponderance of the evidence showed that a signal was given, and we would not be inclined to disturb the verdict on that account. We recite these facts for the purpose of showing that the evidence relative to the negligence charged was in conflict, and was exceedingly close.

crossing whistle was sounded just as the train left the bridge a quarter of a mile east of the crossing. As to the whistle being sounded, Greason is corroborated by the conductor, expressman messenger, a signal supervisor, a telegraph lineman, and a small minor, all of whom were on the train, and by Wiseman, a truck driver, who was [illegible] Plaintiff.

300 to 400 yards from the crossing. As to the ringing of the bell, Greason was corroborated by Mason, who was on the road going across the Kingsley farm, by Wiseman, and by Bailey Ayres, who was driving a truck east on the Southport road about 150 feet west of the crossing. On the other hand appellee testified he heard no bell or whistle, and he is corroborated by five other witnesses. One of these was in the smoker on the train. One of them Bishop, was riding in a [illegible] across the Kingsley farm, and three were in an automobile on the Peoria & Southport road, west of the crossing. The four were in trucks testified the engines of their trucks were running, were making some noise, and this might have prevented them from hearing a bell or whistle, even if one had been sounded. Mason, who testified he heard the bell, was crossing the Kingsley farm and was close to Bishop, who was also in a truck, and who testified he heard no bell or whistle. From all this conflicting evidence it is apparent that it was a very close question whether appellee established by a preponderance of the evidence, that no bell was rung or whistle sounded. However, if the rest of the evidence in the case established the liability of appellant as charged in the declaration, we would be very much inclined to say that it was a question of fact for the jury to determine whether the preponderance of the evidence showed that a signal was given, and we would not be inclined to disturb the verdict on that account. We recite these facts for the purpose of showing that the evidence relative to the negligence charged was in conflict, and was exceedingly close.

We next come to the question as to whether appellee was in the exercise of reasonable care. The preponderance of the evidence shows that from the crossing there is a clear view at least to the bridge, which is about a quarter of a mile away, and some of the witnesses testified the view was not obstructed for a considerable distance beyond the bridge. Appellee claims the telegraph poles on the south side of the right of way obstructed the view, but the evidence shows that the lowest cross arm on these poles was sixteen feet above the ground, and therefore could not have made much of an obstruction. It is also claimed that the girders of the bridge obstructed the view. Several photographs showing the track east of the crossing were offered in evidence, and from these and the other evidence we do not think appellee has established his claim that he could not see the train because of obstructions between him and the bridge, or even beyond it. It is admitted the afternoon was clear. When appellee stopped to open the gate his truck was facing west or northwest. There were no curtains or obstructions on the right side of the truck, but there was a load of coal on the rear which may have obstructed the view in that direction. He testified that when he got out of the truck to open the gate he looked to west and saw no train. He then opened the gate and looked in the other direction and saw no train. He testified he could see beyond the bridge a quarter of a mile, which would make a half a mile from the crossing; that he could have seen a train the whole distance to the bridge. He testified he got into the truck and started up the grade onto the ~~trak~~ tracks. His truck turned from the west or northwest directly to the north. By leaning forward as he went through the gate and up the grade and looking to the east he could have seen the train. The track curved to the southeast, but he testified he could have seen the bridge, but he did not look and was struck. After the injury he was put on a stretcher and placed

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When appellee stopped to open the gate his truck was facing east or northeast. There was a wagon or buggy

on the right side of the track, but there was a load of coal on the rear which may have obstructed the view in that direction. He testified that when he got out of the truck to open the gate he looked to west and saw no train. He then opened the gate and looked in the other direction and saw no train. He testified he could see beyond the bridge a quarter of a mile, which would make a half a mile from the crossing; that he could have seen a train the whole distance to the bridge. He testified he got into the truck and started up the grade onto the track. The track turned from the west or northwest directly to the north. By leaning forward as he went through the gate and up the grade and looking to the east he could have seen the train. The truck arrived to the crossing, he testified he could have seen the bridge, but he did not look and was struck. After the injury he was put on a stretcher and placed

in the baggage car. Several witnesses testified to statements made by him at that time. He asked how badly his truck was damaged, and stated what relatives of his should be notified. One witness testified he said to appellee: "For goodness sake man, couldn't you see that train coming?" and appellee replied, "No, I didn't- I was watching the fellows across the tracks, who were waving at me, and I thought they wanted to come across the track first before I did." He also said: "You bet I will never cross that crossing again without looking." Another witness testified appellee said he drove into the track without looking. The men who were in the Hoffman truck on the Peoria and Southport road, west of the crossing, testified they tried to warn appellee and call his attention to the train, but he did not pay any attention. They could see him in the cab behind the wheel, but they did not know whether he saw them.

The driver of an automobile approaching a railroad crossing is bound, where the view is unobstructed, to make a reasonable use of his senses to guard his own safety, and to look for approaching trains at such a distance as will enable him to ascertain whether a train is in sight, and his failure so to do constitutes negligence. Chicago, Rock Island & Pacific Railroad Co. vs. Jones, 135 Ill. App. 380; Kennedy vs. Alton Traction Company, 180 Ill. App. 146; Stein vs. Chicago & Eastern Illinois. Railroad Co., 199 Ill. App. 48; Hack vs. Chicago Interurban & Traction Company 201 Ill. App. 572. In Gray vs. Chicago & Northwestern Railroad Co., 155 Ill. App. 428, on page 431, it is ~~sad~~-said: "On the other hand, plaintiff's testimony demonstrates that while he may have looked for an approaching train while standing in front of the elevated train, he did not look for it while approaching the defendant's tracks. Had he done so he must have inevitable seen it, as there was nothing whatever to obstruct his view. This was in our judgment under all the circumstances, clearly such contributory negligence as justified a direction of a verdict of not guilty." The question of

in the baggage car. Several witnesses testified to statements made by him at that time. He asked how badly his truck was damaged, and stated what relatives of his should be notified. One witness testified he said to appellee: "Ter goodness sake man, couldn't you see that train?" and appellee replied, "No, I didn't- I was watching the fellows across the tracks, who were waving at me, and I thought they wanted to come across the track first before I did." He also said: "You bet I will never [illegible] looking." [illegible] testified appellee said he drove into the train without looking. The men who were in the Hoffman truck on the Peoria and Southport road, west of the crossing, testified they tried to warn appellee and call his attention to the train, but he did not pay any attention. They could see him in the cab behind the wheel, but they did not know whether he saw them.

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contributory negligence is a question of fact for the jury, Chicago & Alton Railroad Co. vs. Pollock, 195 Ill. 156, but under the evidence in this case we think the finding of the jury that the appellee was in the exercise of due care and caution for his own safety is manifestly against the weight of the evidence, and when this fact is considered in connection with the further fact that the evidence relative to the negligence of the appellant as charged, is very close, we consider it is our duty to reverse this judgment and remand the cause.

Reversed and Remanded.

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Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

399a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 2 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7266

The People of the State of Illinois,
Defendant in error,

vs.

George Rademaker,
Plaintiff in error,

235 I.A. 624

Error to the County Court
of Ogle County

Jett, P.J.

This is a prosecution under an indictment returned by the Grand Jury at the October term, 1922, of the Circuit Court of Ogle County, which said indictment was, on the 25th day of January, 1923, by the said Circuit Court certified to the County Court of said County for process and trial. The indictment consists of 13 counts all of which were based on, and charged the plaintiff in error with violating section 3 of the Illinois Prohibition Act.

The case was tried by a jury on the 7th day of March, 1923, and the plaintiff in error was found guilty in manner and form as charged in the 3rd, 6th, 7th, 8th, 9th and 10th counts of the indictment, and by the court sentenced to sixty days in jail on the third count, and to pay a fine of $100 each on the 6th, 7th, 8th, 9th and 10th counts. Plaintiff in error prosecutes this writ with a view of reversing the judgment.

The third count of the indictment charges the plaintiff in error with unlawfully having a still in his possession without having a permit therefor as required by law; the 6th, 7th, 8th and 9th counts each charge plaintiff in error with unlawfully ~~disposing of~~ selling intoxicating liquor and the 10th charges him with unlawfully disposing of intoxicating liquor. These being the only counts in the indictment on which a conviction was had, no other counts or charges are before us for consideration in the decision of the case. Prior to the trial no question was raised as to the sufficiency of the indictment, by motion to quash or otherwise.

It is first insisted by plaintiff in error, that the verdict of the jury is not supported by the evidence. The testimony of the witness Lindsey, shows that he was a resident of Freeport, Illinois, and employed as an electrician; that on Sunday, the 24th day of September 1922, he, in company with

two of his friends: namely, Dickhoff and Lutz went to a certain farm in Ogle County; that he went at the suggestion of Dickhoff and Lutz; that he had never been to the farm before; that there on the farm he met George Rademaker, the plaintiff in error, and two young men whom he learned were the sons of the plaintiff in error; that the plaintiff in error brought out a quart bottle of intoxicating liquor, "Moonshine", and gave him and his two friends each a drink and informed them they could buy all they wanted at $2.25 a quart; that Dickhoff and Lutz each bought a quart and paid plaintiff in error the sum of $2.25 for each quart, and that thereafter Dickhoff and Lutz each bought another quart from plaintiff in error and paid him the sum of $2.25 per quart; and then and there he, Lindsey, purchased one quart of liquor from plaintiff in error, and paid him therefor the sum of $2.25. The witness testified that George Rademaker, the plaintiff in error, sold them the liquor and identified him from the witness stand as the defendant.

Lindsey further testified the liquor they purchased from the said George Rademaker was intoxicating and that it made him and his two friends drunk; that they were later in the day at or near Cederville, Stephenson County, Illinois arrested by the sheriff of said Stephenson County and taken to the City of Freeport. At Freeport he informed the officers he could not tell them where or from whom the liquor was purchased but that he would take them to the place where they obtained it, and in company with George C. Donstad, Chief of Police of the City of Freeport and others, went to the farm of plaintiff in error, the place where he in company with his two friends purchased the intoxicating liquor.

Lindsey further testified that he had never been to the farm before the day on which he purchased the liquor and had never seen George Rademaker before that day. On the trial he he also indentified Jacob J. Rademaker and Jake Miller as being present when plaintiff in error sold the liquor to the witness and his friends.

The record further discloses that the Chief of Police of

two of his friends; namely, Dickoff and Lutz went to a certain farm in Ogle County; that he went to the assertion of Dickoff and Lutz; that he had never been to the farm, namely that there on the farm he met George Redemeyer, who was not in error, and two young men whom he learned were Lutz and the plaintiff in error; that the plaintiff in error offered him a quart bottle of intoxicating liquor, "moonshine", and he, him and his two friends each drank and imbibed thereof; could buy all they wanted at $2.50 a quart; that Dickoff and Lutz each bought a quart and said to plaintiff in error the sum of $2.50 for each quart, and that therefor Dickoff and Lutz each bought another quart from plaintiff in error and paid him the sum of $2.50 for a quart; and then and there he, Lindsey, purchased one quart of liquor from plaintiff in error, and paid him therefor the sum of $2.50. The witness testified that George Redemeyer, the plaintiff in error, took from the liquor and identified him from the witness stand as the defendant.

Lindsey further testified the liquor was purchased from the said George Redemeyer was intoxicating and that it made him and his two friends drunk; that they were later in the day at or near Cedarville, Stephenson County, Illinois arrested by the sheriff of said Stephenson County and taken to the City of Freeport. At Freeport he informed the officers he could not tell them where or from whom the liquor was purchased but that he would take them to the place where the defendant, and in company with George C. Donahue, Chief of Police of the City of Freeport and others, went to the farm of plaintiff in error, the place where he in company with his two friends purchased the intoxicating liquor.

Lindsey further testified that he had never been to the farm before the day on which he purchased the liquor and had never seen George Redemeyer before that day. On the trial he he also identified Jacob J. Redemeyer and the officer as being present when plaintiff in error sold the liquor to the witness and his friends.

The record further discloses that the Chief of Police of

Freeport, Sheriff Banning of Ogle County, and Meyers, a Deputy Sheriff, after the witness Lindsey pointed out the place where the intoxicating liquor was purchased made a search of the premises occupied by the plaintiff in error, and found a stove a cooker and a lid therefor which was warm, and also a copper coil, a barrel of mash and a bottle containing a quantity of the finished product. The several parts of the still or device used for manufacturing liquor were found at different places, and near where the stove was located, the mash was found.

The defense interposed by the plaintiff in error was that of an alibi. He claims he was not present at the time and place where the witness Lindsey says he purchased the intoxicating liquor. Plaintiff in error testified, among other things, that on the 24 day of September 1922, the day on which it is alleged the offense was committed he and a man by the name of Whitmore were on the Pecatonica River looking for wild grapes and walnuts; that they went there on the night of the 23 of September 1922, and remained there until the night of the 24. He denied that he was at home on the day the liquor was sold to Lindsey and his two friends, and testified that he had never seen Lindsey before the time of the trial.

Plaintiff in error testified further that on the night of the 23 he went to Shannon with his son and at that time had no intentions of going to the Pecatonica river with Whitmore, and without saying anything about it to his son, he got in the car with Whitmore and went to the river to look for walnuts and for grapes with which to make grape juice. He produced no witness except Whitmore, that had any knowledge he was on the river on the night of the 23 and 24 of September.

Whitmore, who testified that he was with plaintiff in error on the night of the 23 and on the day of the 24 of September undetook to fix the time by associating it with the time he got out of jail in Mount Carroll, for making wine.

Jake Miller a witness testified he lived at the home of plaintiff in error and that on the afternoon of the 24 day of September, 1922, Lindsey, Dickhoff and Lutz came to the

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Rademaker place and one of the three inquired for a certain man and he told them he did not know the man; that the one who made the inquiry walked away and went up to a man standing near him, and the man went around west of the house and came back with a package which he handed to either Lindsey, Lutz or Dickhoff. He also testified that he went to a ball game in Freeport shortly after dinner on the 24 day of September, and got back about five o'clock and that Rademaker's son Jacob went with him and at about six o'clock that evening they again left the farm and went to Freeport and that plaintiff in error was not at home all day.

On cross examination the witness Miller testified that he did not know whether or not plaintiff in error was at home during the afternoon while they were at the ball game. He further testified that he had lived with plaintiff in error since 1921, and has lived with him continuously from the 24 day of September 1922 up to the time of the trial, and that he never at any time talked to plaintiff in error or his attorney, about the case and that no one knew what he was going to testify until he got on the witness stand.

The witness, Edward Rademaker, a son of plaintiff in error testified on direct examination, that on the night of the 23 of September 1922, he took his father to Shannon and left him there and that he did no t see him again until the night of the 24th; that he was at home all day on the 24 and did not see anyone there at all. On cross examination he stated that on the night of the 23, he took his father to Shannon and left him there; that he did not know where he went and did not know whom he went with and did not know that he was going anywhere, and the first he knew of his father going away was the next day; that his father had not said anything to him about not going home with him but that when he got ready to go home from Shannon he got in his car without looking for his father or inquiring for him or knowing whether or not he wanted to go home.

Jacob J. Rademaker, a son and witness for plaintiff in error, testified that on the ~~same~~ afternoon of the 24 of September, Lindsey, Dickhoff and Lutz came to their place. He further test-

Redemeier place and one of the three inquired for a certain man and he told them he did not know the man; that the one who made the inquiry walked away and went up to a man standing near him, and the man went around west of the house and came back with a package which he handed to either Lindsay, Butz or Bickhoff. He also testified that he went to a ball game in Freeport shortly after dinner on the 24 day of September, and got back about five o'clock and that Redemeier's son Joseph went with him and at about six o'clock that evening they again left the farm and went to Freeport and that plaintiff in error was not at home all day.

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Jacob E. Redemeier, a son and witness for plaintiff in error, testified that on the ~~first~~ afternoon of the 24 of September, Lindsay, Bickhoff and Butz came to their place. He further tes-

ified that his father was not at home on the 24 of September, that he went away on the night of the 23, and did not return until the following night. He denied having talked to any one about the case, and yet he testified on cross examination that on the night previous to the trial his father, the plaintiff in error, asked him, if his father was not away from home on the 24 of September 1922.

The abstract is exceedingly brief. We have been obliged to examine the record in order to ascertain what the evidence shows, and having done so, and having examined carefully the testimony of the plaintiff in error, and of his witnesses and particularly the cross examination of his witnesses, we can readily understand why the jury returned a verdict finding the defendant guilty. This court will not set aside a verdict unless it is palpably against the weight of the evidence. People vs. Popvich, 295 Ill. 491-496. People vs. Karpovich 288 Ill. 268. People vs. Lutzow 240 id. 612; ~~People~~ People vs. Deluce, 237; id. 541; Cronk vs. People; 131 id. 56; ~~id. 612; People~~ Steffy vs. People, 130 id. 98.

It is contended by plaintiff in error, that the counts and each of them on which the defendant was found guilty do not charge a commission of an offence under the Prohibition Law or Seizure Act. The only suggestion found in the record on which plaintiff in error has a right to base any argument relative to the insufficiency of the indictment is found in the Seventh assignment of errors which is as follows: "The court below erred in rendering the judgment, it ddd on the indictment in that the counts on which judgment was rendered stated no cause of action and made no case of a violation of the Prohibition Act."

The count of the indictment charging the plaintiff in error with having a still, charged that he did then and there unlawfully have a still in his possession without having first secured a permit to own such still, while the said County of Ogle was then and there Prohibition territory.

ified that his father was not at home on the 24 of September, that he went away on the night of the 23, and did not return until the following night. He denied talked to any one about the case, and yet he testified on cross examination that on the night previous to the trial his father, the plaintiff in error, asked him, if his father was not away from home on the 24 of September last.

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It is contended by plaintiff in error, that the counts and each of them on which the defendant was found guilty do not charge a commission of an offence under the Prohibition law or Statute Act. The only suggestion found in the record on which plaintiff in error has a right to base any argument relative to the insufficiency of the indictment is found in the Seventh assignment of errors which is as follows: "The court below erred in rendering the judgment, it did on the indictment in that the counts on which judgment was rendered stated no cause of action and made no case of a violation of the Prohibition Act."

The count of the indictment charging the plaintiff in error with having a still, charged that he did then and there unlawfully have a still in his possession without having first secured a permit to own such still, while the said County of Cook was then and there Prohibition territory.

The counts relative to sales charged that the said Rademaker within the County of Ogle, did then and there unlawfully sell intoxicating liquor while the said County of Ogle was then and there Prohibition territory; that the counts of course having the propr conclusion as contemplated by statute.

We have examined the various suggestions that have been made by plaintiff in error relative to the insufficienty of the indictment, and each count there on which he was conviceted, and we are of the opinion that each count charged a violation of the Prohibition Act.

It is insisted that the court erred in refusing to give a number of instructions offered on the part of the plaintiff in error. The court was clearly right in refusing to give the first instruction complained of by plaintiff in error because it was an invitation to the jury to disagree. The second refused instruction was covered in others given on the part of plaintiff in error as well as on the part of the defendant in error. The third refused instruction is in the usual form and is substantially a correct statement of the law. It told the jury that if they believed from the evidence that any witness willfully and knowingly swore falsely to any material fact in the case, then they had a right to disregard his testimony except where corroborated by other evidence of circumstances in the case. The giving of this instruction would have been more detrimental to the cause of the laintiff in error than to that of the defendant in error, in view of the facts as shown in the record. The jury was fully informed as to the law of the case taking the instructions together as a series, and we are not prepared to say that the refusal of this instruction was reversible error.

The fifth refused instruction relates to what constituted possession of intoxicating liquor. The refusal of this instruction was in no way prejudicial to plaintiff in error, because of the fact that plaintiff in error was not on the trial convicted of unlawfully possessing intoxicating liquor.

The sixth instruction refused by the Court is as follows: "The jury in instructed by the Court that if you can reconcile the

The courts relative to sales charged that the said defendant within the County of Ogle, did then and there unlawfully sell intoxicating liquor while the said County of Ogle was then and there "Prohibition territory; that the County in which was the trial, constituted an judicial area of district.

We have examined the various suggestions that have been made by plaintiff in error relative to the insufficiency of the indictment, and each count there on which he was convicted, and we are of the opinion that each count charged a violation of the Prohibition Act.

It is insisted that the court erred in refusing to give a number of instructions offered on the part of the plaintiff in error. The court was clearly right in refusing to give the first instruction complained of by plaintiff in error because it was an invitation to the jury to disagree. The second refused instruction was covered in others given on the part of plaintiff in error as well as on the part of the defendant in error. The third refused instruction is in the usual form and is substantially a correct statement of the law. It told the jury that if they believed from the evidence that any witness willfully and knowingly swore falsely to any material fact in the case, then they had a right to disregard his testimony except where corroborated by other evidence or circumstances in the case. The giving of this instruction would have been more detrimental to the cause of the plaintiff in error than to that of the defendant in error, in view of the facts as shown in the record. The jury are fully informed as to the law of the case taking the instructions together as a whole, and we are not prepared to say that the refusal of this instruction was reversible error.

The fifth refused instruction relates to what constituted possession of intoxicating liquor. The refusal of this instruction was in no way prejudicial to plaintiff in error, because of the fact that plaintiff in error was not on the trial charged of unlawfully possessing intoxicating liquor.

The sixth instruction refused by the Court is as follows:

"The jury in instructed by the Court that if you can reconcile the

evidence in this case upon any other reasonable belief or hypothesis than that of this defendant's guilt then it is your duty to acquit the defendant." An instruction of this character should not be given in a case unless it is one in which the testimony relied upon on the part of the people for a conviction is made up largely of circumstances. The evidence was direct on the part of the People. relative to the sale and disposal of intoxicating liquor and that being true it was proper to refuse the instruction. If it was offered because of the evidence bearing on the count in the indictment charging the possession of a still, it should have been limited to that count, it was not so limited and the Court properly refused the instruction. Appellant relies upon the case of the People vs. Ahrling 279 Ill. 70, as authority for insisting that the sixth refused instruction should have been given. On an examination of the opinion of the Court in the Ahrling case it will be found that the People relied entirely upon circumstancial evidence for a conviction.

We have examined the other two instructions that were refused by the Court and are of the opinion that no error was committed in their refusal.

After a careful examination of the record in this cause we are of the opinion no prejudicial error intervened in the trial of the case. The judgment of the County Court of Ogle County will be, and the same is affirmed.

Judgment Affirmed.

evidence to the contrary notwithstanding, stated:

hypothesis than that of this defendant's guilt than it is your duty to acquit the defendant." An instruction of this character should not be given in a case unless it is one in which the testimony relied upon on the part of the State for a conviction is made up largely of circumstances. The evidence was direct on the part of the People. Relative to the sale and disposal of intoxicating liquor and that being true it was proper to refuse the instruction. If it was offered because of the evidence bearing on the count in the indictment charging the possession of a still, it should have been limited to that count, it was not so limited and the Court properly refused the instruction. Appellant relies upon the case of the People vs. Lurling 279 Ill. 70, as authority for insisting that the sixth refused instruction should have been given. On an examination of the opinion of the Court in the Lurling case it will be found that the People

We have examined the other two instructions that were refused by the Court and are of the opinion that no error was committed in their refusal.

After a careful examination of the record in this cause we are of the opinion no prejudicial error intervened in the trial of the case. The judgment of the County Court of Ogle County will be, and the same is affirmed.

Mr. Justice.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

4000a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 624

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 26 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7288

Wisconsin Oakland Co.

Appellant.

vs.

Rockford Auto Parts Co.

Appellee.

235 I.A. 624

Appeal from the Circuit Court of Winnebago County.

Jett, P. J.

This is a proceeding in replevin and involves the ownership of an Oakland automobile. The automobile in question was sold by appellant, an automobile distributor, with its principal place of business in Milwaukee, Wisconsin to one Max Foth who was doing business under the name of the Broadhead City Garage at Broadhead, Wisconsin, and who held an agency contract with appellant.

Foth paid 15 per cent of the price agreed to be paid to appellant at the time the car was delivered to him and a note with conditional sales contract was given as a balance of the purchase price.

Foth traded the car to appellee for a Chalmers car, appellee paying a difference of $1250.00 in cash. At the close of all the evidence offered by appellant, appellee filed a motion for a directed verdict in its favor insisting that appellant at the time it sold the automobile in question to Foth, and subsequent thereto had expressly and impliedly consented to the re-sale of said automobile by licensing him as a dealer, allowing him to hold himself out as the owner of the car, place it with other automobiles of his own in his showroom and offer it indiscriminately with other cars to the public, and contending also that the said sales contract had not been filed as required by the Wisconsin Uniform Sales Act. The motion was granted and the jury instructed to find the defendant not guilty. The jury returned a verdict accordingly, after which appellant, by its counsel moved the Court to set aside the verdict and grant a new trial, which motion was over-ruled and a judgment entered for appellee and against appellant that it takes nothing and go hence without day and for cost.

The abstract in this case serves no purpose other than that

Wisconsin Oakland Co.

Appellant.

vs.

Rockford Auto Parts Co.

Appellee.

Appeal from the
Circuit Court of
Winnebago County.

Jett, P. J.

This is a proceeding in replevin and involves the ownership of an Oakland automobile. The automobile in question was sold by appellant, an automobile distributor, with its principal place of business in Milwaukee, Wisconsin to one Max Roth who was doing business under the name of the Rockford City Garage at Rockford, Illinois, and who held an agency contract with appellant.

Roth paid 15 per cent of the price agreed to be paid to appellant at the time the car was delivered to him and a note with conditional sales contract was given as a balance of the purchase price.

Roth traded the car to appellee for a Chalmers car, appellee paying a difference of $1280.00 in cash. At the close of all the evidence offered by appellant, appellee filed a motion for a directed verdict in its favor insisting that appellant at the time it sold the automobile in question to Roth, and subsequent thereto had expressly and impliedly consented to the re-sale of said automobile by licensing him as a dealer, allowing him to hold himself out as the owner of the car, place it with other automobiles of his own in his showroom and offer it indiscriminately with other cars to the public, and contending also that the said sales contract had not been filed as required by the Wisconsin Uniform Sales Act. The motion was overruled and the jury instructed to find the defendant not guilty. The jury returned a verdict accordingly, after which appellant, by its counsel moved the Court to set aside the verdict and grant a new trial, which motion was over-ruled and judgment entered for appellee and against appellant. Hence this appeal.

The abstract in this case covers no "evidence other than that

of an index. The record, however, discloses that section 9 of the Uniform Conditional Sales Act of the State of Wisconsin, is as follows: "When goods are delivered under a conditional sales contract and the seller expressly and impliedly consents that the buyer may resell them prior to the performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this chapter."

William M. Thompson, a witness on the part of appellant, testified he was secretary and treasurer of appellant company and that said company was a corporation located at Milwaukee, Wisconsin; that Foth conducted and maintained a sales room at Broadhead, in said state, where he was showing Oakland and other cars, and as to the car in question Foth was offering it indiscriminately for sale at his sales room. It is conceded by appellant that Foth had the right to sell the car in question in the regular course of business but it insists as he drove the said automobile some 40 miles from the city of Broadhead outside of the state and disposed of it, receiving another car and $1250.00 incash, the disposition of the car was not in the regular course of business.

Appellant placed the car in the power of Foth to be disposed of by him. There is no evidence to show that Foth could make the sales only in his place of business. Appellant having made it possible for Foth to sell the car it would be a strained construction of said Uniform Sales Act to hold, that to take the car from the floor of the sales room to a prospective purchaser in order that he might exhibit it, and in the event of a sale, say it was not in the ordinary course of business.

The second reason urged by appellee in support of its motion to direct a verdict is that section 5 of the Uniform Conditional Sales Act of the State of Wisconsin provides that every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of

of an index. The record, however, discloses that section 1 of the Uniform Conditional Sales Act of the State of Wisconsin, is as follows: "When goods are delivered under a conditional sales contract and the seller expressly and impliedly consents that the buyer may resell them prior to the performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this chapter."

William M. Thompson, a witness on the part of appellant, testified he was secretary and treasurer of appellant company and that said company was a corporation located at Milwaukee, Wisconsin; that Roth conducted and maintained a sales room at Broadhead, in said state, where he was showing Oakland and other cars, and as to the car in question Roth was offering it indiscriminately for sale at his sales room. It is conceded by appellant that Roth had the right to sell the car in question in the regular course of business but it insists as he drove the said automobile some 40 miles from the city of Broadhead outside of the state and disposed of it, receiving another car and $1250.00 thereon, the disposition of the car was not in the regular course of business.

Appellant placed the car in the power of Roth to be disposed of by him. There is no evidence to show that Roth could make the sales only in his place of business. Appellant having made it possible for Roth to sell the car it could be a violation construction of said Uniform Sales Act to hold, that to take the car from the floor of the sales room to a prospective purchaser in order that he might exhibit it, and in the event of a sale, say it was not in the ordinary course of business.

The second reason urged by appellee in support of its motion to direct a verdict is that section 3 of the Uniform Conditional Sales Act of the State of Wisconsin provides that every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of

the buyer, who, without notice of such provision, purchases the goods or acquired by attachment or levy a lien upon them before the contract or copy thereof shall be filed as provided in this chapter unless such contract or copy is so filed within 10 days after the making of the conditional sale, and section 10 of said act provides that the filing officer shall mark upon the contract or copy filed with him the day and hour of the filing and shall file the contract or copy in his office for public inspection. That he shall keep a separate book in which he shall enter the name of the seller and buyer, the date of the contract, the day and hour of filing, a brief description of the goods, the price named in the contract and the date of the cancellation thereof.

The record discloses the fact that the records of the city clerk were not indexed as required by the Sales Act of Wisconsin; neither does it show the date of the contract, the description of the goods nor the price named in the contract. It will be observed that sections 5 and 10 of the Act relied upon by appellant were not complied with by it.

It is also contended by appellant that the Court should have permitted the jury to pass upon the evidence admitted in the case. From the facts as disclosed in the record it was for the Court to construe the Sales Act or the parts thereof that were offered by appellant.

We have examined the authorities relied upon by the appellant in support of its contention. It must be remembered that the law of necessarily arises from the facts in a given case. The case of appellant must stand or fall upon the provisions of the Uniform Sales Act of Wisconsin. Appellant has not brought itself within the provisions of that Act so that it may take refuge there under. The evidence tending to prove a cause of action which will entitle the plaintiff to have it passed upon by a jury, and which will render it error to instruct the jury to find for the defendant, must be more than a mere scintilla of evidence. It must be evidence upon which the jury can, without acting unreasonably in the eye of the law, decide in favor of the plaintiff

the goods or secured by attachment or levy a lien upon them before the contract or copy thereof shall be filed as provided in this chapter unless such contract or copy is so filed within 10 days after the making of the conditional sale, and section 10 of said act provides that the filing officer shall mark upon the contract or copy filed with him the day and hour of the filing and shall file the contract or copy in his office for public inspection. That he shall keep a separate book in which he shall enter the name of the seller and buyer, the date of the contract, the day and hour of filing, a brief description of the goods, the price named in the contract and the date of the cancellation thereof.

The record discloses the fact that the records of the city clerk were not indexed as required by the Sales Act of Wisconsin; neither does it show the date of the contract, the description of the goods nor the price named in the contract. It will be observed that sections 5 and 10 of the Act relied upon by appellant were not complied with by it.

It is also contended by appellant that the Court should have permitted the jury to pass upon the evidence admitted in the case. From the facts as disclosed in the record it was for the Court to construe the Sales Act or the parts thereof that were litigated in question.

We have examined the authorities relied upon by the appellant in support of his contention. It must be remembered that the law of necessarily arises from the facts in a given case. The case of appellant must stand or fall upon the provisions of the Uniform Sales Act of Wisconsin. Appellant has not brought himself within the provisions of that Act so that it may take advantage thereunder. The evidence tending to prove a course of action which will entitle the plaintiff to have it passed upon by a jury, and which will render it error to instruct the jury to find for the defendant, must be more than a mere scintilla of evidence. It must be evidence upon which the jury can, without resting unreasonably in the eye of the law, decide in favor of the plaintiff

of the party producing it. Libby, McNeill & Libby vs. Cook 222 Ill. 206.

We are of the opinion that the Court committed no error in directing a verdict and the judgment of the Circuit Court will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four,

Justus L. Johnson
Clerk of the Appellate Court.

4001a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 625

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 26 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7295

The People of the State of Illinois,

Plaintiff in error,

vs.

Evelyn Piper,

Defendant in error.

235 I.A. 325

Writ of Error to the County Court of Will County.

Jett. P. J.

This is a writ of error sued out of this Court to review an order of the County Court of Will County entered upon a petition filed by Ernest J. Piper, in the County Court of Kankakee County, the case having been taken to Will County on change of venue.

The petition set up that on the 15th day of October, 1921, the County Court of Kankakee County entered an order giving the custody of Evelyn Piper to Mr. & Mrs. Henry Hagenow, and appointed Mrs. Hagenow guardian of the said child, who by the order was declared to be dependent. It was also found in the order that the petitioner was not a fit and proper person to have the care, custody and control of said child. The petitioner sets up in his said petition that he is now a proper person to have the care, custody and control of the child; that he is the father of said Evelyn Piper, and has a good home and is able, ready and willing to give to her proper parental care. The prayer of the petitioner is that the former order be set aside and vacated and the care, custody, control and education of said child be given to him.

A hearing was had upon the petition and much evidence was offered upon the part of the petitioner to show that he was a proper and fit person to have the care, custody and control of his child. A number of witnesses testified on the part of the People that the petitioner was not a fit person to have the custody of the child.

The Court upon due consideration of the evidence found in favor of the petitioner, and entered an order restoring Evelyn Piper to the custody of said ~~petitoner~~ petitioner and discharging the guardian but left the order of dependency in

The People of the State of Illinois,

Plaintiff in error,

vs.

Evelyn Piper,

Defendant in error.

Writ of Error to

Will County Court

of Will County.

Left. I. J.

This is a writ of error sued out of this Court to review an order of the County Court of Will County entered upon a petition filed by Ernest J. Piper, in the County Court of Kankakee County, the case having been taken to Will County on change of venue.

The petition set up that on the 15th day of October, 1921, the County Court of Kankakee County entered an order giving the custody of Evelyn Piper to Mr. & Mrs. Henry Hagenow, and appointed Mrs. Hagenow guardian of the said child, who by the order was declared to be dependent. It was also found in the order that the petitioner was not a fit and proper person to have the care, custody and control of said child. The petitioner sets up in his said petition that he is now a proper person to have the care, custody and control of the child; that he is the father of said Evelyn Piper, and has a good home and is able, ready and willing to give to her proper parental care. The prayer of the petitioner is that the former order be set aside and vacated and the care, custody, control and education of said child be given to him.

A hearing was had upon the petition and much evidence was offered upon the part of the petitioner to show that he was a proper and fit person to have the care, custody and control of his child. A number of witnesses testified on the part of the People that the petitioner was not a fit person to have the custody of the child.

The Court upon due consideration of the evidence found in favor of the petitioner, and entered an order restoring Evelyn Piper to the custody of said petitioner petitioner and discharging the guardian but left the order of dependency in

force and retained jurisdiction over the child.

We have examined minutely the evidence as disclosed by the record, and we are of the opinion that the judgment of the Court upon the facts is correct, and there being no assignment of errors at law the judgment of the County Court of Will County will be affirmed.

Judgment Affirmed.

force and retained jurisdiction over the child.

We have examined minutely the evidence as disclosed by the record, and we are of the opinion that the judgment of the Court upon the facts is correct, and there being no assignment of error at law the judgment of the County Court of Will County will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and ~~twenty-~~ four.

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct 8, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 26 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Mary Ann Lebioda,
Defendant in error,
vs.
Joseph Lebioda,
Plaintiff in error,

Error to the Circuit Court
of La Salle County

Jett, P.J.

Mary Ann Lebioda, defendant in error, filed her bill for divorce from Joseph Lebioda, plaintiff in error, on April 25, 1923, in which she charged him with being guilty of extreme and repeated cruelty toward her. The suit was brought to the June term of the Circuit Court of La Salle County which convened on June 14, 1923.

The said Joseph Lebioda, plaintiff in error, was served with process five days after the filing of the bill of complaint. After summons had been served on plaintiff in error he consulted with an attorney but filed no answer. He was defaulted at the term to which the bill was filed and on June 27, the cause was heard.

Defendant in error and her eldest son testified and a decree was entered granting her a divorce and giving to her title to a piece of property occupied as a homestead. The plaintiff in error moved to vacate the decree at the term it was entered. The motion to vacate was taken under advisement and was so held until the October Term of court following. At the opening of the October Term the court overruled the motion to set aside the decree, plaintiff in error then moved the court to vacate the order overruling the motion to set aside the decree.

A hearing was had on the motion at the said October term; namely, on the 14th day of November, 1923 and evidence was heard and the motion to vacate the order overruling the motion to set aside the decree was denied. The decree as originally entered found that the plaintiff in error had been guilty of extreme and repeated cruelty "subsequent" to the date of the filing of the bill. At said October term on December 13, 1923, the court permitted an amendment of the decree changing the word "subsequent"

Mary Ann Bebiede,

Defendant in error,

vs.

Joseph Bebiede,

Plaintiff in error,

Error to the Circuit Court
of La Salle County

Petit, J.:

Mary Ann Bebiede, defendant in error, filed her bill for divorce from Joseph Bebiede, plaintiff in error, on April 25, 1923, in which she charged him with being guilty of extreme and repeated cruelty toward her. The suit was brought to the June term of the Circuit Court of La Salle County which convened on June 4, 1923.

The said Joseph Bebiede, plaintiff in error, was served with process five days after the filing of the bill of complaint. After summons had been served on plaintiff in error he commenced with an attorney but filed no answer. He was defaulted at the term to which the bill was filed and on June 27, the cause was heard.

Defendant in error and her client were testified and a decree was entered granting her a divorce and giving to her title to a piece of property occupied as a homestead. The plaintiff in error moved to vacate the decree at the term it was entered. The motion to vacate was taken under advisement and was so held until the October Term of court following. At the opening of the October term the court overruled the motion to set aside the decree, plaintiff in error then moved the court to vacate the order overruling the motion to set aside the decree.

A hearing was had on the motion at the said October term, namely, on the 14th day of November, 1923 and evidence was heard and the motion to vacate the order overruling the motion to set aside the decree was denied. The decree as originally entered found that the plaintiff in error had been guilty of extreme and repeated cruelty "subsequent" to the date of the filing of the bill. At said October term on December 1, 1923, the court permitted an amendment of the decree changing the word "subsequent"

to "prior".

Plaintiff in error sued out this writ of error and assigns many reasons for a reversal of the decree. It is first argued by plaintiff in error that there is no evidence in the record that the defendant in error was a resident of La Salle County. The bill alleges that she is a resident of La Salle County and for more than 20 years has been a resident of the State of Illinois, and the decree finds that she was and is an actual resident of the City of Peru in said La Salle County, Illinois. The evidence shows that she and her husband had lived in Peru 27 years; that while they were residents of Peru they raised four children, Joseph, 23 years of age, Veronica 20, Celia 17, and Theresa 14.

The evidence further discloses that by reason of the conduct of the plaintiff in error, defendant in error left her home and went to Chicago and made her home temporarily with her son. If the plaintiff in error was guilty of the extreme and repeated cruelty as found, and by reason of his conduct she left her home and went to the home of her son, we are not prepared to say that she could not legally return to the county in which the extreme and repeated cruelty was inflicted and file her bill for separation. Peru in La Salle County was her home. There is no evidence in this record that would authorize the vacating the decree on the ground that plaintiff in error was not a resident of La Salle County. On the motion to vacate the order refusing to set aside the decree, plaintiff in error examined a number of witnesses touching the merits of the case. The court saw and heard them testify and he denied the motion to set aside the order by which he refused to vacate the decree.

It is next insisted by the plaintiff in error that the court erred in permitting an amendment of the decree on December 15, 1923, for the reason that no notice was given to him. It appears that the original decree recited that the plaintiff in error had been guilty of extreme and repeated cruelty subsequent to the filing

to "prison".

Plaintiff in error dwell upon this writ of error and contend many reasons for a reversal of the decree. It is first argued by plaintiff in error that there is no evidence in the record that the defendant in error was a resident of De Kalb county. The bill alleges that she is a resident of De Kalb county and for more than 60 years has been a resident of the State of Illinois, and the decree finds that she was and is an actual resident of the city of Iowa in said De Kalb county, Illinois. The evidence shows that she and her husband had lived in Iowa 37 years; that Joseph, 83 years of age, Vermilion 80, Delia 17, and Theresa 14.

The evidence further discloses that by reason of the conduct of the plaintiff in error, defendant in error left her home and went to Chicago and made her home temporarily with her son. At eventide he found, and by reason of his treatment she left her home and went to the home of her son, we are not prepared to say that she could not legally return to the county in which the cruelty and repeated cruelty was inflicted and file her bill for separation. Iowa in De Kalb County was her home. There is no evidence in this record that would authorize the vacating the decree on the ground that plaintiff in error was not a resident of De Kalb county.

The issues, plaintiff in error examined a number of witnesses touching the conduct of the cruelty. The court saw and heard testify and he denied the motion to set aside the order by which he refused to vacate the decree.

It is next insisted by the plaintiff in error that the court erred in permitting an amendment of the bill on January 14, 1888, for the reason that no notice was given to him. It appears that the original decree recited that the plaintiff in error had been guilty of extreme and repeated cruelty subsequent to the filing

of the bill. On December 13, 1923, the court permitted an amendment of the decree changing the word "subsequent" to "prior". The court retained jurisdiction of the case and had jurisdiction at the time the amendment was made and the amendment was for the purpose of correcting a clerical error. The court had ample authority to make the correction and no notice was necessary to plaintiff in error.

It is also insisted that the court was in error in not setting aside the decree. It is quite apparent, from what is disclosed by the record, that the plaintiff in error was perfectly willing his wife should have a divorce, but the fact that the court decreed a part of the property to be in defendant in error, that she by her labors had helped to accumulate, is the cause for his desiring the decree set aside and vacated.

In conclusion we are of the opinion that the plaintiff in error did not make such a showing as would authorize the setting aside and vacating of the decree and therefore the decree of the Circuit Court of La Salle County will be and is affirmed.

Decree Affirmed.

of the bill. On December 17, 1902, the court permitted an amendment of the decree changing the word "independent" to "minor". The court retained jurisdiction of the case and had jurisdiction at the time the amendment was made and the amendment was for the purpose of correcting a judicial error. The court had ample authority to make the correction and no notice was necessary to plaintiff in error.

It is also insisted that the court was in error in not setting aside the decree. It is quite apparent, from what is disclosed by the record, that the plaintiff in error was peacefully within his right, have a divorce, but the fact that the court decreed a part of the property to be in defendant in error, that was by her I have had begun to accumulate, is no cause for his declaring the decree null and void.

In conclusion we are of the opinion that the plaintiff in error did not make such a showing as would authorize the vacating and resetting of the decree and therefore the decree of the district court of the Kalle County will be and is affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

4002a

AT A TERM OF THE APPELLATE COURT,

235 I.A. 625

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 28 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Joe Saldino,

appellee,

vs.

Rockford City Traction Company,

appellant,

235 I.A. 625

(CONSOLIDATED)

Vito Digirolamo,

appellee,

vs.

Rockford City Traction Company,

appellant,

Appeal from the Circuit Court of Winnebago County.

Jett, P.J.

The two above entitled causes were each instituted before a Justice of the Peace in the County of Winnebago, for damages claimed to have resulted to the automobiles of appellees by reason of the alleged negligence of the appellant. A trial was had in the Justice of the Peace court and appellees recovered judgments against the Rockford City Traction Company. Appeals were prosecuted to the Circuit Court where the cases were consolidated and tried, and a judgment was obtained in favor of Joe Saldino, appellee for $23.00 and in favor of Vito Digirolamo, appellee, for $65.00 against Rockford City Traction Company, appellant, and this appeal followed.

The collision that occasioned the damages to the automobiles of appellees took place on September 25, 1921. It appears that the automobiles of appellees were being driven in a westerly direction on the side of a street in the City of Rockford, and a street car of appellant travelling in the same direction approached them. Before the street car of appellant reached the automobiles of appellees, a Ford car turned suddenly in front of the street car. The street car struck the Ford car and knocked it against the automobiles of appellees and damages them. The

street car struck the Ford just back of the front wheel about the center of the fender. The impact caused the Ford to hit a Chevrolet car owned and driven by appellee Digirolamo, whose car in turn hit the Chevrolet car owned and operated by Joe Saldino. The contention on behalf of appellees is that the street car did not sound its bell before it struck the Ford and this is the only negligence charged against appellant.

The evidence on the part of appellees, bearing on the question of negligence, in itself is not sufficient to sustain the verdicts unless it further appears that the failure to sound the bell was the proximate cause of the damages to the automobiles.

We have carefully examined the evidence offered by the appellees bearing on the alleged negligence of appellant and standing alone it is not, in our opinion, sufficient to justify the verdict. In actions of this character the burden was upon appellees to allege and prove such negligent acts by appellant as would entitle them to recover. This they have failed to do. The evidence fails to show that the negligence complained of was the proximate cause of the damages to the automobiles.

We are clearly of the opinion that the judgments should be reversed and the causes remanded, which is accordingly done.

Reversed and Remanded.

street car pushed the front left wheel of the front truck about the center of the fender. The impact caused the front to lift a Chevrolet car owned and driven by appellee Hutchinson, which car in turn hit the Hornsbeck car owned and operated by Joe Reifsino. The contention on behalf of appellees is that the street car did not cause the bell before it struck the Ford car. This is the fact, Illinois Central Gulf Railroad Co.

The evidence on the part of appellees, bearing on the question of negligence, in itself is not sufficient to sustain the verdicts unless it further appears that the failure to sound the bell was the proximate cause of the damages to the automobiles.

We have carefully examined the evidence offered by the appellees bearing on the alleged negligence of appellant and standing alone it is not, in our opinion, sufficient to justify the verdict. In months of this commission the burden was upon appellees to allege and prove such negligence made by appellant as would subtile them to recover. This they have failed to do. The evidence fails to show that the negligence complained of was the proximate cause of the damages to the automobiles.

We are clearly of the opinion that the judgments should be reversed and the causes remanded, which is accordingly done.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty four,

Justus L. Johnson
Clerk of the Appellate Court.

4003a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 26 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

235 I.A. 625

Louis Smith,
appellee,
vs.
John Stoecker,
appellant,

Appeal from the Circuit Court
of Peoria County.

Jett, P.J.

This is a suit in assumpsit, instituted by Louis Smith, appellee, against John Stoecker, appellant, in the Circuit Court of Peoria County, for work and labor alleged to have been performed by appellee for appellant.

A jury trial was had and the jury found for appellee and assessed his damages at the sum of Eleven Hundred Dollars. Motion for a new trial was denied, judgment rendered on the verdict and appellant prosecutes this appeal.

The declaration consists of the common counts and one special count, to which the general issue was pleaded. It is the contention of appellee that he was employed by appellant, July 15, 1921, to work in a soft drink establishment, and was to receive thirty-five dollars per week; that he worked about one year and until he was discharged by appellant; appellee testified he received Four Hundred Dollars in payment, which he had taken out of the cash drawer and left slips indicating the sums that he received. Appellant interposed two defenses, one of which was that he did not hire appellee and did not promise to pay him $35.00 a week but that they were partners in the running of an ice-cream parlor; the second that appellee had given him a receipt in full settlement, bearing date September 1, 1922. Appellee denied the signature to the receipt.

It is first urged that the verdict is contrary to the evidence. Whether the receipt was genuine or not was a question of fact for the jury. It was likewise the province of the jury to

Stella Smith,

appellee,

vs.

John Dressler,

appellant.

Opt. J.J.

Appeal from the Sixth court

of Scott County.

This is a suit in assumpsit, instituted by Stella Smith, appellee, against John Dressler, appellant, in the Sixth court of Scott County, for work and labor alleged to have been rendered by appellee for appellant.

A jury trial was had and the jury found for appellee and assessed her damages at the sum of Eleven Hundred Dollars. Motion for a new trial was denied, judgment rendered on the verdict and appellant prosecutes this appeal.

The declaration consists of the common counts and one special count, to which the general issue was pleaded. It is the contention of appellee that he was employed by appellant, July 18, 1923, to work in a soft drink establishment, and was to receive thirty-five dollars per week; that he worked since the year and that he was discharged by appellant; appellee testified he received two Twenty Dollars in payment, which he did taken out of the week during and July 23rd after the time he resigned. Appellant interposed two defenses, one of which was that he did not hire appellee and did not promise to pay him $35.00 a week; and that they were partners in the running of an ice-cream parlor; the second that appellee had given him a receipt in full settlement, bearing date September 1, 1923. Appellee denied the signature to the receipt.

It is first urged that the verdict is contrary to the evidence. Neither the receipt was genuine or not was a question to be decided by the jury. It was following the evidence of the jury in

BY

235 I.A. 625

determine whether or not the appellant employed appellee. In view of the state of the record the verdict of the jury will not be disturbed on the ground that it is not supported by the evidence. It is earnestly insisted by appellant that there is a variance between the alleged specific contract, relied upon by appellee and the averments in the declaration.

It will be observed the evidence of appellee discloses that he had performed the services for which he seeks to recover; that the contract ran from week to week; that on or about the 15th of July, 1922, on a Saturday night, he checked the money and was told by appellant to quit, and that he gave appellant the keys and left.

In an action to recover for services, rendered under a special contract, which has been substantially performed and nothing remains but the payment of money a recovery may be had under the common counts, and the party seeking to recover need not declare specially upon the contract and in such case the measure of damages is the sum due under the contract. Pickard & Munger vs. Bates & Towslee, 38 Ill. 40. Sands vs. Potter, 165 Ill. 397-406.

Appellant insists the court erred in refusing instruction No. One, offered by him. The instruction is as follows:

"If you believe from the evidence that the signature on the receipt introduced in evidence is the genuine signature of Louis Smith, then you are instructed that said receipt is evidence of the highest and most satisfactory character of the payment in full, by John Stoecker to Louis Smith, of all money due him from John Stoecker, at the time of the making of said receipt."

This instruction was properly refused. It invades the province of the jury by telling them what weight to give to the evidence.

Appellant also insists that the court erred in refusing instruction No. Four, tendered by him. Instruction No. Four informed the jury that they could not presume the defendant

forged the receipt offered in evidence, over the signature of the plaintiff, but the receipt is to be received with the presumption that it was regularly made, and this presumption must prevail until overcome by the greater weight of the evidence. This instruction is clearly bad because it instructs the jury to the effect that there is a presumption that appellee signed the receipt and that appellant did not forge it. The court committed no error in the refusal of instructions.

We conclude therefore, that the record is free from error and the judgment of the Circuit Court of Peoria County should be affirmed, which is accordingly done.

Judgment Affirmed.

forced the receipt offered in evidence, over the objections of the plaintiff, but the receipt is to be received with the presumption that it was regularly made, and this presumption must prevail until overcome by the greater weight of the evidence. This instruction is clearly bad because it instructs the jury to the effect that there is a presumption that cancellos signed the receipt and that appellant did not sign it. The court committed no error in the refusal of instructions.

We conclude therefore, that the record is free from error and the judgment of the Circuit Court of Pocahontas County should be affirmed, which is accordingly done.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.

in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson

Clerk of the Appellate Court.

Rehearing Denied
Oct. 15, 1924.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 26 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7346

Marie A. Baker,

Appellee,

vs.

Edward Baker,

Appellant.

235 I.A. 625

Appeal from the

Circuit Court of

La Salle County.

Jett, P. J.

Marie A. Baker, the appellee, and Edward Baker, the appellant, were married on the 14th day of June, 1899, and have two children, one a daughter about 22 years of age who is a talented musician and has practically completed her education. The other is a son 18 years of age and is attending the State University at Albuquerque, New Mexico. The appellant is a wholesale grocer at Streator, Illinois, and owns substantially all of the capital stock of his company, which is incorporated.

On the second day of May 1922, appellee filed her bill in the Circuit Court of La Salle County for a divorce from appellant, charging extreme and repeated cruelty, alleged to have been committed on two separate occasions on the 11th. day of April 1922. Appellant filed his answer but did not contest the charges of cruelty set forth in the bill of complaint.

On the 11th. day of July, 1922, appellee obtained a decree of divorce and the custody of Stephen Baker, the son of the parties litigant herein. In the decree the Court reserved the question of alimony for a future and further decree and held the matter under advisement until the 11th day of February, 1924, when without further hearing a decree was entered requiring the appellant to pay $217. to St. Mary's Hospital, $230. to cover a bill due to a Dr. Wilson, an unstated amount said to be due Lyons & Healey of Chicago and $325. per month alimony and giving to appellee all of appellants household goods and furniture which were reasonably necessary for her use, and the exclusive use of appellants home without charge or cost of any kind for one year. From which decree appellant prosecutes this appeal.

The undisputed evidence in this case is that the gross income of appellant is $4800 a year and that there are about $500 in fixed charges which appellant must pay out of his

Appellee,

vs.

Appellant.

Apt. 2. 4.

Merle A. Baker, the appellee, and Jerry Baker, the appellant, were married on the 18th day of June, 1949, and have two children, one a daughter about 8 years of age who is a talented musician and has practically completed her education. The mother is a man 32 years of age and is identified with Illinois University at Albuquerque, New Mexico. The appellant is a wholesale grocer at Streator, Illinois, and owns much nearly all of the capital stock of his company, which is incorporated.

On the second day of May 1952, appellee filed her bill in the Circuit Court of La Salle County for a divorce from appellant, charging extreme and repeated cruelty, alleged to have been committed on two separate occasions on the 11th day of April 1952. Appellant filed his answer but did not answer the charges of cruelty set forth in the bill of complaint.

On the 11th day of July, 1952, appellee obtained a decree of divorce and the custody of Stephen Baker, the son of the parties litigant herein. In the decree the court reserved the question of alimony for a future and further decree and held the matter open for further hearing. Later, on the 17th day of September, 1952, when without further hearing a decree was entered requiring the appellant to pay $217. to Dr. Harry A. Longwell, $250. to cover a bill due to a Dr. Gibson, an unstated amount said to be due Lyons & Healey of Chicago and $225. per month alimony and giving to appellee all of appellant's personal property. The property rights were reserved. Appellant has always charged he had not had the year. From which decree appellant appealed.

The undisputed evidence is that when it came the time because of appellant's illness I said and that then the court on final hearing entered a decree in the amount of $217.

salary. These fixed charges consist of taxes and premiums on a life insurance policy carried for the benefit of appellee.

The only question to be determined in this proceeding is whether or not the allowance of alimony is excessive. The allowance made by the Chancellor to Mrs. Baker, the appellee, including the cash payments, outstanding bills, taxes and repairs on the home will more than consume the total income of the appellant. The rule in Illinois that has been generally followed is, as we understand it, in the allowance of alimony to the wife to be paid by the husband, to give to the wife from one-third to one-half of the husbands income.

In this case there is only one dependent child, the son. He is being educated according to the testimony at the cost of about $1000 per annum. This sum should be allowed to the wife so long as the son is being educated, and until the further order of the Court.

The appellant, is disclosed in this record, is afflicted with an incurable malady from which he has been suffering for twelve years last past, and he has been unable to get relief from his ailment.

We are of the opinion that an allowance to appellee in the sum of $2000 annually is sufficient for her necessities and will provide her with the comforts to which she has been accustomed during her married life.

In our opinion after an examination of the record the appellant, after paying the bill found due to St. Mary's Hospital, the sum of $230 to cover a bill due Dr. Wilson and the sum due Lyon & Hesley, should not be required to pay to appellee to exceed $1000 annually for the education of his son Stephen and $2000 for the support and maintenance of appellee. The said $2000 to be paid in monthly installments on the first day of each month and the $1000 to be paid quarterly.

In view of the conclusion we have reached, the decree of the Circuit Court of La Salle County is reversed, and the cause is remanded with directions to modify the original decree as herein indicated.

Reversed and remanded with directi

money. These fixed charges consist of taxes and premium on a life insurance policy carried for the benefit of appellee.

The only question to be determined in this proceeding is whether or not the allowance of alimony is excessive. The allowance made by the Chancellor to Mrs. Baker, the appellee, including the cash payments, substantial gifts, taxes and revenue on the home will more than consume the total income of the appellant. The rule in Illinois that has been generally followed is, as we understand it, in the allowance of alimony to the wife to be paid by the husband, to give to the wife from one-third to one-half of the husbands income.

In this case there is only one dependent child, the son. He is being educated according to the testimony at the cost of about $1000 per annum. This sum should be allowed to the wife so long as the son is being educated, and until the further order of the Court.

The appellant, is disclosed in this record, is afflicted with an incurable malady from which he has been suffering for twelve years last past, and he has been unable to get relief from his illness.

We are of the opinion that an allowance to appellee in the sum of $2000 annually is sufficient to her necessities and will provide her with the comforts to which she has been accustomed during her married life.

In our opinion after an examination of the record the appellant, after paying the bill found due to St. Mary's Hospital, the sum of $250 to cover a bill due Dr. Wilson and the sum due Lyon & Healey, should not be required to pay to appellee to exceed $1000 annually for the education of his son Stephen and $2000 for the support and maintenance of appellee. He said $2000 to be paid in monthly installments on the first day of each month and the $1000 to be paid quarterly.

In view of the conclusion we have reached, the decree of the Circuit Court of La Salle County is reversed, and the cause is remanded with directions to modify the original decree as herein indicated.

Reversed and remanded with directi

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

4004a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 626

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL 26 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Edward Hinkley,
Appellee,
vs.
International Harvester Company
of America
Appellant.

235 I.A. 626

Appeal from the
Circuit Court of
Winnebago County.

Jett, P. J.

This is an action on the case for an alleged personal injury, instituted by Edward Hinkley, appellee, against International Harvester Company of America, appellant, in the Circuit Court of Winnebago County. This cause has been before this Court on two former occasions. On the first trial at the close of the evidence the Court directed a verdict in favor of the appellant, and on an appeal to this Court the judgment was reversed. Hinkley vs. International Harvester Co. of America, 224 Ill. App. 622. On the second trial a judgment was obtained by appellee for $6500. and on appeal it was reversed because of an erroneous instruction. On the third trial in the Circuit Court of said County the jury returned a verdict in favor of appellee for $8000. On which a judgment was rendered, and the appellant prosecutes this appeal. As a full statement of the facts was made in the first opinion filed by this court it will not be necessary to make a detailed statement at this time.

The first error urged is that the Court improperly refused to direct a verdict in favor of the appellant. After an examination of the record in this proceeding, we are of the opinion that the evidence is substantially the same as it was upon the first and second trials and the holding in the first opinion is binding upon the Court. Our attention has not been called to any evidence that indicates that there is any substantial difference in the testimony on the last trial from what was presented on the first hearing, we are, therefore, of the opinion that the Court did not commit error in refusing to direct a verdict in favor of appellant.

Howard Hinkley,
Appellee,

vs.

International Harvester Company
of America,
Appellant.

Appeal from the
Circuit Court of
Lawrence County.

Mr. J.

This is an action on the case for an alleged personal injury, instituted by Howard Hinkley, appellee, against International Harvester Company of America, appellant, in the Circuit Court of Lawrence County. This cause has been before this Court on two former occasions. On the first trial at the close of the evidence the Court directed a verdict in favor of the appellant, and on an appeal to this Court the judgment was reversed. Hinkley vs. International Harvester Co. of America, 324 Ill. App. 582. On the second trial a judgment was obtained by appellee for $6000. and on appeal it was reversed because of an erroneous instruction. On the third trial in the Circuit Court of said County the jury returned a verdict in favor of appellee for $3000. On which a judgment was rendered, and the appellant prosecutes this appeal. As a full statement of the facts was made in the first opinion filed by this court it will not be necessary to make a detailed statement at this time.

The first error urged is that the Court improperly refused to direct a verdict in favor of the appellant. After an examination of the record in this proceeding, we are of the opinion that the evidence is substantially the same as it was upon the first and second trial in and the holding in the first opinion is binding upon the Court. Our attention has not been called to any evidence that indicates that there is any substantial difference in the testimony on the last trial from what was presented on the first hearing, we are, therefore, of the opinion that the Court did not commit error in refusing to direct a verdict in favor of appellant.

Appellant contends the judgment should be reversed because the verdict is against the manifest weight of the evidence. The Appellate Court will not disturb the finding of a jury whose province it was to pass upon the facts unless the evidence preponderates against the verdict. It will be remembered that two juries have passed upon the facts in this case and in each instance they found in favor of the contention of appellee. We have carefully reviewed the evidence, and we are not prepared to say that the verdict of the jury is against the manifest weight of the testimony.

Appellant insists that the Court erred in the giving of the first, second and third instructions given on behalf of appellee. The first instruction complained of announces a rule that when the directions of the master are general as to the business in which the servant is employed he confides in his discretion, but when the directions are specific it is otherwise. In the former case the master becomes liable for all the acts of the servant, performed in the discharge of the duties required. Oxford vs. Peter 28 Ill. 434-435. The second instruction complained of by the appellant states merely the general and well established rule of agency and is supported in C.M. & St. P. Ry. Co. vs. West 125 Ill. 320; Harding vs. St. Louis Stock Yards 242 Ill. 45; Hayes vs. Campbell ~~247~~ 274 Ill. 258. The objection made to the third instruction is very similiar to that made to the second. We are of the opinion the Court did not err in the giving of instructions one, two and three that were read to the jury on the part of appellee.

It is insisted that the Court erred in refusing to give at the request of appellant refused instruction No. I. This instruction related to the question as to whether or not appellee was guilty of negligence either in the position in which he stood or in the placing his hand where he did at the time of his receiving the injuries of which he complains. On an examination of the given instructions it is quite clear that the jury was fully instructed at the suggestion of appellant upon the subject of contributory negligence. Instructions three, five, six,

Appellant contends the judgment should be reversed on account the verdict is against the manifest weight of the evidence. The appellate Court will not disturb the finding of a jury where evidence is such as could cause the Trial Judge the evidence preponderates against the verdict. It will be remembered that two juries have passed upon the facts in this case and in each instance they found in favor of the contention of appellee. We have carefully reviewed the evidence, and we are not prepared to say that the verdict of the jury is against the manifest weight of the testimony.

Appellant insists that the Court erred in the giving of the first, second and third instructions given on behalf of appellee. The first instruction complained of announces a rule that when the directions to the worker are general or in the business in which the servant is employed he constitutes in his discretion, but when the directions are specific, it is otherwise. In the former case the master because liable for all the acts of the servant, pertinent to the business of the doing required. Cited in. Ryan 13 Ill. Appeals. The second instruction as claimed of by the appellant states merely the general rule well established that if injury and is attributed to [illegible] R. R. 2 Ill. App. 73. Pa. Reg 142 Ill. [illegible] Lucia Ryan 13 Ill. App. [illegible] The objection made to the third instruction is very similar to that made to the second. We are of the opinion the Court did not err in the giving of instructions one, two and three that were read to the jury on the part of appellee.

It is insisted that the Court erred in refusing to give at the request of appellant refused instructions 1. [illegible] instruction refused at the request of appellant is in [illegible] was guilty of negligence either in the [illegible] or in the placing his head where he did at the time [illegible] giving the injuries of which he complains. On an examination of the given instructions it is quite clear that the jury was fully instructed as the [illegible] of contributory negligence. Indianapolis Union. [illegible]

eight and nine given on the part of appellant cover the same subject matter included and mentioned in the refused instruction No. I. Not, however, in the same language but so clearly and distinctly that the jury could not have been misled as to the rule of law announced in said instructions. Taking the instructions as a series they fairly present the law arising from the facts in the case. We are unable to see where appellee was prejudiced in any way by the refusal of the giving of instructions. The jury was liberally instructed on the part of appellant.

It is said by appellant that the Court erred in admitting on behalf of appellee, improper and incompetent evidence in rebuttal. We are of the opinion that whether the testimony offered in rebuttal was properly admitted or not was a matter that was in the sound discretion of the trial court and we are unable to say that the Court abused its judgment in that respect. It is also urged by appellant that by reason of certain remarks made by counsel for appellee, in the argument of the case to the jury, the Court erred in refusing to grant a new trial. We recognize the rule that in the argument of a case to a jury counsel should be confined to the facts of the case and base the argument upon the facts and law but we recognize that it is almost impossible to lay down any general rule as to what shall or what shall not be said in the argument of a given cause. Much ~~latitude~~ latitude is always allowed in the argument of the facts and of the reasonable inferences to be drawn therefrom. We have examined the remarks complained of and we are unable to say that the Court erred in refusing a new trial because of the argument of the counsel for appellee. There may be some merit in the contention of appellant but certainly it is not such as would work a reversal of the case.

The evidence on the trial being substantially the same as on the two former trials and the finding of the jury being the same on the second and third trials relative to the question of the negligence of appellant, and the jury having been instructed fully as to the law of the case arising out of the facts, we

eight and nine given on the part of appellant cover the same subject matter included and mentioned in the refused instruction No. 1. Not, however, in the same language but so clearly and distinctly that the jury could not have been misled as to the rule of law announced in said instructions. Taking the instructions as a series they fairly present the law arising from the facts in the case. We are unable to see where appellee was prejudiced in any way by the refusal or the giving of instructions. The jury was liberally instructed on the part of appellant.

It is said by appellant that the Court erred in admitting on behalf of appellee, improper and incompetent evidence in rebuttal. We are of the opinion that whether the testimony offered in rebuttal was properly admitted or not was a matter that was in the sound discretion of the trial court and we are unable to say that the Court abused its judgment in that respect. It is also urged by appellant that by reason of certain remarks made by counsel for appellee, in the argument of the case to the jury, the Court erred in refusing to grant a new trial. We recognize the rule that in the argument of a case to a jury counsel should be confined to the facts of the case and base the argument upon the facts and law but we recognize that it is almost impossible to lay down any general rule as to what shall or what shall not be said in the argument of a given cause. Much latitude is always allowed in the argument of the facts and of the reasonable inferences to be drawn therefrom. We have examined the remarks complained of and we are unable to say that the Court erred in refusing a new trial because of the argument of the counsel for appellee. There may be some merit in the contention of appellant but certainly it is not such as would work a reversal of the case.

The evidence on the trial being substantially the same as on the two former trials and the finding of the jury being the same on the second and third trials relative to the question of the negligence of appellant, and the jury having been instructed fully as to the law of the case arising out of the facts, we

are of the opinion that the judgment of the Circuit Court of Winnebago County should be affirmed which is accordingly done.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of Aug. in the year of our Lord one thousand nine hundred and twenty-four,

Justus L. Johnson
Clerk of the Appellate Court.

4003a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 626

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 6 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7284 Agenda Number 5

Frances Lokar, Appellant)
vs.) Appeal from Will.
Frank Lokar, Appellee)

235 I.A. 626

Jones J:

Frances Lokar, the appellant, filed her bill for divorce, in the Circuit Court of Will County, against the appellee, Frank Lokar, on the grounds of extreme and repeated cruelty. The case was tried before a jury, which returned a verdict, in favor of the appellee. The chancellor, after overruling the motion to set aside the verdict, and grant a new trial, entered a decree, dismissing the bill for want of equity. From that decree, this appeal is prosecuted.

The appellant had been previously married, and lived with her husband for twenty four years. There were no children born of this union. Four years after the death of her husband, the parties to this suit were married. At the time, the appellant was sixty years of age. She ran a small store in Joliet. The appellee was forty years of age. He was a day laborer. Several specific acts of cruelty are set up in the bill. There was evidence on the part of the appellant to support three of them. In her own testimony, she is corroborated by two witnesses, while the appellee's testimony stands alone. He claims that at the times mentioned in appellant's testimony that appellant was intoxicated; that when she became intoxicated, she became violent and abusive both in her language and in her actions, and that he used only such force as was necessary to restrain her from using violence upon him.

It is urged upon the part of appellant that the defense sought to be raised is one of recrimination, and that to constitute such a defense, the acts of the complainant to be availed of must be such, that they constitute a ground of divorce. Counsel for appellant misconceive the defense set up in the

General Number 7284 Appeals Number 5

Frances Loker, Appellant)
) Appeal from Will.
vs.)
Frank Loker, Appellee)

June 1:

Frances Loker, the appellant, filed her bill for divorce, in the Circuit Court of Will County, against the appellee, Frank Loker, on the grounds of extreme and repeated cruelty. The case was tried before a jury, which returned a verdict, in favor of the appellee. The chancellor, after overruling the motion to set aside the verdict, and granted a new trial, entered a decree, dismissing the bill for want of equity. From that decree, this appeal is prosecuted.

The appellant had been previously married, and lived with her husband for twenty four years. There were no children born of this union. Four years after the death of her husband, the parties to this suit were married. At the time, the appellant was sixty years of age. She ran a small store in Joliet. The appellee was forty years of age. He was a day laborer. Several specific acts of cruelty are set up in the bill. There was evidence on the part of the appellant to support three of them. In her own testimony, she is corroborated by two witnesses, while the appellee's testimony stands alone. He claims that at the times mentioned in appellant's testimony that appellant was intoxicated; that when she became intoxicated, she became violent and abusive both in her language and in her actions, and that he used only such force as was necessary to restrain her from using violence upon him.

It is urged upon the part of appellant that the defense sought to be raised is one of recrimination, and that to constitute such a defense, the acts of the complainant to be availed of must be such, that they constitute a ground of divorce. Counsel for appellant misconceive the defense set up in the

answer, and the effect to be given the acts of the appellee. The appellee denies the commission of the acts of cruelty, but does say that on the occasions mentioned by the appellant in her testimony, the appellant, became violent and abusive, and that he used only such force as would restrain her in so far as her violent conduct was directed against him. This he had a right to do. (Von Glahn vs. Von Glahn 46 Ill. 135; Youngs vs. Youngs 130 Ill. 230; Garrett vs. Garrett 252 Ill. 218). Whether the evidence was sufficient to justify a decree in favor of the appellant was a question of fact for the jury and as well for the Chancellor upon the motion to set aside the verdict and for a new trial. Both the jury and the Chancellor saw and heard the witnesses. They were able to judge of their credibility and of the weight to be given to their testimony and they have found for the appellee. While we think the jury might have been justified in finding for the appellant nevertheless, we cannot say they were wrong and in such a case we can but affirm the decree. (Garrett vs. Garrett, Supra; Zeigler vs. Chicago City Ry. Co. 152 Ill. App. 409; Springfield Con. R. R. Co. vs. Lane 116 Ill. App. 517)

It is also urged that the Court erred in admitting evidence tending to show that the appellant was intoxicated at the times, she complained of the conduct of the appellee. It is said that this amounts to charging her with drunkeness, as a recriminatory charge. We do not so view the rulings of the Court. The appellee had a right to show all of the circumstances attending the encounters testified to by the complainant, and if one of the circumstances was that she was drunk, then he had a right to have that fact in evidence. No other complaint is made.

The decree of the Chancellor will therefore be affirmed.

Decree Affirmed.

answer, and the effect to be given the acts of the appellee. The appellee denies the commission of the acts or cruelty, but does say that on the occasions mentioned by the appellant in her testimony, the [illegible] . [illegible] that he used only such force as would restrain her in so far as her violent conduct was directed against him. Thinks he had a right to do. (Von Glahn vs. Von Glahn 46 Ill. 158; Younga vs. Younga 150 Ill. 230; Garrett vs. Garrett 252 Ill. 316). Whether the evidence was sufficient to justify a decree in favor of the appellant was a question of fact for the jury and so well for the Chancellor upon the motion to set aside the verdict and for a new trial. Both the jury and the Chancellor saw and heard the witnesses. They were able to judge of their credibility and of the weight to be given to their testimony and they have found for the appellee. While we think the jury might have been justified in finding for the appellant nevertheless, we cannot say they were wrong and in such a case we can not affirm the decree. (Garrett vs. Garrett, supra; [illegible] vs. [illegible] Ry. Co. 158 Ill. App. 408; Springfield Con. R. R. Co. vs. Lane 116 Ill. App. 317)

It is also urged that the Court erred in admitting evidence tending to show that the appellant was intoxicated at the times she complained of the conduct of the appellee. It is said that this amounts to charging her with drunkenness, as a terminatory charge. We do not so view the rulings of the Court. The appellee had a right to show all of the circumstances attending the encounter- ers testified to by the complainant, and if one of the circumstances was that she was drunk, then he had a right to have that fact in evidence. No other complaint is made.

The decree of the Chancellor will therefore be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of Sept. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

Rehearing Denied
Oct 8, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7315 Agenda No. 14

People of the State of Illinois)
defendant in error,)
vs.) Writ of Error to Warren County.
Jennie Russell Shook, Plaintiff)
in error)

235 I.A. 626

Jones J:

The plaintiff in error was found guilty on two counts of an information filed in the county court, of Warren County. The Ist, 2nd and 4th counts charged illegal sale of intoxicating liquors, and the 3rd count charged illegal possession of intoxicating liquors. The information was filed on the 2nd day of October 1923. The plaintiff in error was arrested on the 5th day of October and arraigned on the 9th. At that time, her attorneys moved to quash the information. This motion was overruled on that day. On the 15th day of October, the case was called for trial and her attorneys then asked for a list of witnesses. The list was furnished almost immediately, whereupon the defendant moved for a continuance, over the term, and filed an affidavit in support of the motion. This motion was overruled and the cause proceeded to trial. The jury returned a verdict of guilty, upon counts two and three of the information.

It is first urged that the motion to quash the Ist, 2nd, and 3rd counts of the information should have been allowed. The information was written on printed forms, consisting of two sheets of paper, fastened together, each containing forms for two counts. The blank for the affidavit at the end of the first sheet, was not filled out, but the affidavit at the end of the second sheet was sworn to by Charles E. Lauder, and recites "That the within information against Jennie Russell Shook, is true." The information had one file mark upon the outside of it, as folded. It is urged that there were two informations and that

People of the State of Illinois
Defendant in error,

vs.

Writ of Error to Vermilion
County.

Bonnie Bonnell (No. 1),
Plaintiff in error

June 2:

The plaintiff in error was found guilty on two counts of an information filed in the county court, of Vermilion County. The 1st, 2nd and 4th counts charged illegal sale of intoxicating liquors, and the 3rd count charged illegal possession of intoxicating liquors. The information was filed on the 2nd day of October 1952. The plaintiff in error was arrested on the 5th day of October and arraigned on the 9th. At that time, her attorneys moved to quash the information. This motion was overruled on that day. On the 15th day of October, the case was called for trial and her attorneys then asked for a list of witnesses. The list was furnished almost immediately, whereupon the defendant moved for a continuance, over the term, and filed an affidavit in support of the motion. This motion was overruled and the cause proceeded to trial. The jury returned a verdict of guilty, upon counts two and three of the information.

It is first urged that the motion to quash the 1st, 2nd, and 3rd counts of the information should have been sustained. The information was written on printed forms, consisting of two sheets of paper, fastened together, each containing forms for two counts. The blank for the affidavit at the end of the first sheet, was not filled out, but the affidavit at the end of the second sheet was sworn to by Charles E. Lawler, and contains "the same allegations [illegible] the information had been filed. [illegible] Further, it is urged that [illegible]

the first one containing counts I and 2 is not sworn to. We cannot agree with this contention. It appears to us that the two sheets fastened together as they were and filed as one instrument containing an affidavit of their truth at the end of the second sheet, constitute a single information, consisting of four counts, and that the Court properly overruled the motion to quash the information.

The next contention is that count three of the information ought to be quashed, because it did not charge the commission of any offense. Count three charges that the plaintiff in error "did then and there unlawfully have in her possession certain intoxicating liquor, within Prohibition territory, with intent then and there upon the part of the said Jennie Russell Shook to sell the same in violation of the Prohibition Act of the State of Illinois and contrary to the statute in such case made and provided." The plaintiff in error relies upon the case of the People of the State of Illinois v. Peiscz 226 Ill. App. 363. But that case does not support her contention. In that case, the information read"did then and there unlawfully possess intoxicating liquor within prohibition territory, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the same people of the State of Illinois." We there state "What is the act complained of in this case? Is it the mere possession of liquor? Certainly this cannot be, because as we have heretofore observed such possession is not unlawful and the statute provides no penalty whatever, for mere possession. The act that is unlawful is the possession of intoxicating liquor, to be used in violation of some of the provisions of the Prohibition Act. A union of possession with intent or purpose to violate the act is necessary to constitute a crime. Possession without that intent is not unlawful, and not in violation of any of the provisions of the act; and it goes without saying that the legislature never intended to penalize possessors of intoxicating

liquor, whose purpose or intention was not that of violating the law. This is evidenced from the fact that they made the possession of intoxicating liquor lawful under sections 4, 8 and 40. It is not enough to charge that the possession is unlawful, without stating any of the inhibitions of the statute. On the other hand, it is sufficient to merely charge that the accused did unlawfully commit some act expressly prohibited by the Statute." The information in this case expressly charged that the defendant had possession of the intoxicating liquor "with the intent then and there, upon the part of the said "Jennie Russell Shook to sell the same in violation of the Prohibiton Act, of the State of Illinois." This charge fully meets the requirements laid down in People v. Piesecz, Supra, in charging the possession and the intent to violate the Act by an unlawful sale of the liquor. The Court properly denied the motion to quash the third count at the information.

Plaintiff in error contends that the ~~trial~~ trial court committed reversible error in overruling her motion for a continuance. The affidavit in support of the motion set up that the plaintiff in error had not been given a list of the witnesses, for the prosecution until the morning the case was called for trial, so that she was unable to learn what their testimony might be or whether their reputation for truth and veracity was good. She further stated that she was informed that two of the witnesses were detectives, living in Chicago, whose reputations for truth and veracity were bad and that if she were given time to investigate, she would be able to find and produce witnesses at the next term of the court, who would so testify. No names of witnesses were stated and no facts were given to the court by which the court could say that the plaintiff in error would be able to prove such facts. Neither did the affidavit set out the testimony of any of such witnesses. There in nothing in the affidavit stating evidence to be secured, which touched the merits of the charges made against the plaintiff in

liquor, whose purpose or intention was not that of violating the law. This is evidenced from the fact that they made the possession of intoxicating liquor lawful under sections 4, 8 and 40. It is not enough to charge that the possession is unlawful, without stating any of the inhibitions of the statute. On the other hand, it is sufficient to merely charge that the accused did unlawfully commit some act expressly prohibited by the Statute." The information in this case expressly charged that the defendant had possession of the intoxicating liquor "with the intent then and there, upon the part of the said "Jennie Russell Brown to sell the same in violation of the Prohibition Act, of the State of Illinois." This charge fully meets the requirements laid down in People v. Nixon, supra, in charging the possession and the intent to violate the law by an unlawful sale of the liquor. The Court properly denied the motion to quash the third count at the information.

Plaintiff in error complains that the trial court committed reversible error in overruling her motion for a continuance. The affidavit in support of the motion set up that the plaintiff in error had not been given a list of the witnesses, for the prosecution until the morning the case was called for trial, so that she was unable to learn what their testimony might be or whether their reputation for truth and veracity was good. She further stated that she was informed that two of the witnesses were detectives, living in Chicago, whose reputations for truth and veracity were bad and that if she were given time to investigate, she would be able to find and produce witnesses at the next term of the court, who would so testify. No names of witnesses were stated and no facts were given to the court by which the court could say that the plaintiff in error would be able to prove such facts. Neither did the affidavit set out the testimony of any of such witnesses. There is nothing in the affidavit stating evidence to be material, which touched the merits of the charges made against the plaintiff in

error or that would tend to disprove the charges, but it was wholly of an impeaching character, limited to attacks upon the reputation of the witnesses for the people for truth and veracity. It is also contended that the plaintiff in error was given no opportunity to learn these things.

We are of the opinion that the court committed no error in overruling the motion for a continuance. The people are not required to furnish a list of witnesses to the defendant charged with a misdemeanor, except upon application by the defendant for it. (Section I. Division XIII of Criminal Code). The plaintiff in error might have made such an application upon her arraignment but did not do so. Her counsel urged a motion to quash the information at that time, but did not see fit to secure the names of the witnesses. On the contrary they waited until the case was called for trial to make application for the names of the witnesses for the people. Had they obtained the names of these witnesses at the time of the arraignment, they might have secured such information and such other witnesses as were necessary to a proper defense. The affidavit fails to show such diligence on the part of the plaintiff in error in the preparation of her case as will entitle her to a continuance of the case.

Plaintiff in error urges that the verdict is contrary to the weight of the evidence and that it is not shown beyond a reasonable doubt that the plaintiff in error is guilty of the crime charged. She was convicted, under count 3, which charged the unlawful possession of intoxicating liquor. The evidence in support of count 3 is that her premises were searched by the sheriff in August 1923; that he took therefrom six or seven samples of intoxicating liquor; that an analysis of them showed their intoxicating character. Indeed her counsel admitted that all of the samples of liquor taken were intoxicating. This made a prima facie case under the Statute and there is no denial of the possession or claim that the possesstion came within any of the excepted provisions of the statute. There can be no

error or that would tend to disprove the charges, but it was wholly of an impeaching character, limited to attacks upon the reputation of the witnesses for the people for truth and veracity. It is also contended that the plaintiff in error was given no opportunity to [illegible]

We are of the opinion that the court committed no error in overruling the motion for a continuance. The people are not required to furnish a list of witnesses to the defendant charged with a misdemeanor, except upon application by the defendant for it. (Section 1. Division XIII of Criminal Code). The plaintiff in error might have made such an application upon her arraignment but did not do so. Her counsel urged a motion to quash the information at that time, but did not ask to secure the names of the witnesses. On the contrary they waited until the case was called for trial to make application for the names of the witnesses for the people. Had they obtained the names of Chas. Alderson at any time, it is [illegible], they might have secured such information and such other witnesses as were necessary to a proper defense. The affidavit fails to show such diligence on the part of the plaintiff in error in the preparation of her case as will entitle her to a continuance of the case.

Plaintiff in error urges that the verdict is contrary to the weight of the evidence and that it is not shown beyond a reasonable doubt that the plaintiff in error is guilty of the crime charged. She was convicted, under count 3, which charged the [illegible] in support of count 3 is what her promises were received by the plaintiff in August 1890; that he took [illegible] six or seven [illegible] of incriminating liquor; that on [illegible] of [illegible] which showed that incriminating character. Indeed her counsel admitted that [illegible] of the commission of crime that she possessed liquor in any of the excepted provisions of the statute. There can be no

question whatever of her guilt of the charge made in count 3 of the information.

The evidence in support of her conviction under count 2 is conflicting. Three witnesses testify to having secured and drunk intoxicating liquor in her premises in September 1923. Opposed to this is the testimony of a number of witnesses, who testify that they were present at the time and did not see any intoxicating liquor sold. The jury saw and heard the witnesses. They were able to judge of their credibility far better than we can. The jury were limited to the evidence in the case and we cannot say that they were wrong in finding that the defendant was guilty as charged. (People v. Lutzow 240 id. 612; People v. Deluce 237 id. 541; People v. Popvich 295 id. 491; People v. Herbert 196 Ill. App. 137).

The last contention made by plaintiff in error is that the court erroneously gave People's instructions numbered 2 and 4 and refused to give defendant's refused instruction No. 3. The evidence in this case shows that plaintiff in error unlawfully possessed intoxicating liquor in her home. Instruction number 2 is substantially in the language of Paragraph 40 of the Prohibition Act. That Section has been held constitutional in the case of People v. Beck 305 Ill. 593. It is always competent to instruct the jury in a criminal case in the language of the statute in respect to the charge made.

We have examined instruction number 4 and find that it is not open to the criticisms made of it.

The plaintiff in error's refused instruction number 3 is to the effect that in order to convict the defendant the proof must be consistent with the defendant's guilt and that it is wholly inconsistent with any other rational conclusion. The substance of this instruction is covered in plaintiff's given instruction number 9. Indeed the instructions given on behalf of the plaintiff in error fully and completely prtoect her rights in the case.

Since there is no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

question whether or not the guilt of the charge made in count 1 of the information.

The evidence in support of her conviction under count 2 is conflicting. Three witnesses testify to having secured some drunk intoxicating liquor in her premises in October 1928. Opposed to this is the testimony of numbers of witnesses, who testify that they were present at the time and did not see any intoxicating liquor sold. The jury saw and heard the witnesses. They were able to judge of their credibility far better than we can. The jury were limited to the evidence in the case and we cannot say that they were wrong in finding that the defendant had sold liquor wrongfully. (Fields v. State, 148 Ind. 113; Davis v. Daines 227 id. 641; People v. Sopczak 328 id. 431; People v. Barker 328 Ill. 47.)

The last contention made by plaintiff in error is that the court erroneously gave People's instructions numbered 2 and 4 and refused to give defendant's refused instruction No. 2. The evidence in this case shows that plaintiff in error unlawfully possessed intoxicating liquor for sale. Section 2 of the act, number 2 is substantially in the language of Paragraph 60 of the Prohibition Act. That section has been held constitutional in the case of People v. Dack 328 Ill. 326. It is always competent to instruct the jury in a criminal case in the language of the statute in respect to the charge made.

We have examined instruction number 4 and find that it is not open to the criticism made of it.

The plaintiff in error's refused instruction number 2 is to the effect that in order to convict the defendant the proof must be consistent with the defendant's guilt and that it is wholly inconsistent with any other reasonable hypothesis. The substance of this instruction is covered in plaintiff's given instruction number 2. Taking the instructions given on behalf of the plaintiff in error fairly and comprehensively protect her rights in the case.

Since there is no reversible error in the record, the judgment of the trial court will be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct., in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7318 Agenda Number 17

The People of the State of Illinois, Defendant in Error.

vs.

Vird O. Cudd, Plaintiff in Error.

235 I.A. 626

Writ of Error to County Court of Warren.

Jones J:

The plaintiff in error Vird O. Cudd was convicted in the county court of Warren County on the 11th and 14th counts of an information, containing 19 counts, all charging that the plaintiff in error illegally practiced veterinary medicine and surgery, without having a license or a temporary permit, from the proper authorities of the State of Illinois. The court overruled a motion to set aside the verdict and for a new trial, and entered judgment on the verdict. Thereupon the plaintiff in error sued out this writ of error.

Upon the trial the court admitted in evidence proof of various acts of the plaintiff in error in vaccinating hogs, which were not sick for the purpose of immunizing them, against the disease of cholera. The plaintiff in error argues that the statute, requiring all who practice veterinary medicine and surgery to have a license therefor, from the designated authorities of the state, was originally passed in 1899 and at that time, the vaccination of hogs to prevent them from contracting cholera was unknown; that vaccination could not have been in the contemplation of the legislature in passing the act and is therefore not prohibited by the act. It is said that for this reason, the court erred in admitting evidence of such vaccinations by the plaintiff in error. Whether that contention is correct or not, we need not here inquire. It is sufficient to say that the record is replete with instances, in which the plaintiff in error practiced veterinary medicine and surgery by the administration of drugs to sick animals and by the use of

The People of the State of Illinois,
Defendant in Error.

vs.

Vird O. Udd, Plaintiff in Error.

Writ of Error
to County Court
of Warren.

Jones J:

The plaintiff in error Vird O. Udd was convicted in the county court of Warren County on the 11th and 14th counts of an information, containing 19 counts, all charging that the plaintiff in error illegally practiced veterinary medicine and surgery, without having a license or a temporary permit, from the proper authorities of the State of Illinois. The court overruled a motion to set aside the verdict and for a new trial, and entered judgment on the verdict. Thereupon the plaintiff in error sued out this writ of error.

Upon the trial the court admitted in evidence proof of various acts of the plaintiff in error in vaccinating hogs, which were not sick for the purpose of immunizing them, against the disease of cholera. The plaintiff in error argues that the statute, requiring all who practice veterinary medicine and surgery to have a license therefor, from the designated authorities of the state, was originally passed in 1899 and at that time, the vaccination of hogs to prevent them from contracting cholera was unknown; that vaccination could not have been in the contemplation of the legislature in passing the act and is therefore not prohibited by the act. It is said that for this reason, the court erred in admitting evidence of such vaccinations by the plaintiff in error. Whether that contention is correct or not, we need not here inquire. It is sufficient to say that the record is replete with instances, in which the plaintiff in error practised veterinary medicine and surgery by the administration of drugs to sick animals and by the use of

the knife to remedy diseased conditions.

The evidence is sufficient to sustain a conviction of the plaintiff in error on every one of the 19 counts of the information. In People v. Weir 295 Ill. 268, the Court said, "To justify a reversal on account of error in the admission of evidence it must appear that upon another trial, if the evidence is excluded, a different result might be expected, so that the error deprived the defendant of some substantial right. (People v. Murphy 276 Ill. 304; People v. Green id. 346; People v. Moore, id 392.)" Plaintiff in error made various attempts to secure a license and failed to pass the examination, but notwithstanding this fact, he continued to hold himself out as a veterinarian and to practice veterinary medicine and surgery in clear violation of the provisions of the statute.

Error is assigned in the giving of the 11th instruction, on behalf of the defendant in error, upon the ground that that instruction places upon the defendant the burden of proving that he had a license to practice veterinary medicine and surgery or a temporary permit therefor, under the provisions of the statute. An examination of the instruction shows that it does not place the burden upon the plaintiff in error of proving that he had a license, but it does state that it is incumbent upon him to show that he had a temporary permit, if such were the case. The instruction is more favorable to the plaintiff in error, than the law warrants. The rule, as stated by the Supreme Court, of this State in the case of Kettles v. People 221 Ill. 221, is "Whether the plaintiff in error was licensed to practice dentistry in the state of Illinois was a matter of defense, which devolved on him to establish. Where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant, the averment, unless disproved by the defendant, will be taken as true. Such is the rule in all prosecutions for the doing of an act, which the statute prohibits to be done by any person, except those who are duly licensed.

the trial court's judgment accordingly.

The evidence is sufficient to sustain a conviction of the plaintiff in error on every one of the 12 counts of the information. In People v. Weir 298 Ill. 288, the court said, "To justify a reversal on account of error in the admission of evidence it must appear that upon another trial, if the evidence is excluded, a different result might be expected, so that the error deprived the defendant of some substantial right. (People v. Murphy 274 Ill. 324; People v. [illegible] 12 Ill. App. [illegible], 292.)" Plaintiff in error made various attempts to secure a license and failed to pass the examination, but notwithstanding this fact, he continued to hold himself out as a veterinarian and to practice veterinary medicine and surgery in clear violation of the provisions of the statute.

Error is assigned in the giving of the 11th instruction, on behalf of the defendant in error, upon the ground that that instruction placed upon the defendant the burden of showing that he had a license to practice veterinary medicine and surgery or a temporary permit therefor, under the provisions of the statute. An examination of the instruction shows that it does not place the burden upon the plaintiff in error of proving that he had a license, but it does state that it is incumbent upon him to show that he had a temporary permit, if such were the case. The instruction is more favorable to the plaintiff in error, than the law warrants. The rule, as stated by the Supreme Court, of this State in the case of Kettler v. People 221 Ill. 221, is "Whether the plaintiff in error was licensed to practice dentistry in the state of Illinois was a matter of defense, which devolved on him to establish. Where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant, the averment, unless disproved by the defendant, will be taken as true. Such is the rule in all prosecutions for the doing of an act, which the statute prohibits to be done by any person, except those who are duly licensed.

)Noecker v. People 91 Ill, 468; Williams v. People 121 id. 84)" The rule in this case is later recognized by the court in the case of People v. Montgomery 271 Ill. 580 and Abbau v. Gressie 262 id. 636. In this latter case, the distinction between negative averments, in civil and in criminal cases is pointed out. No evidence was offered on behalf of the plaintiff in error that he did have a license or a temporary permit. In this condition of the record, the plaintiff in error has no ground for complaint and the judgment will therefore be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of Sept. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson

Clerk of the Appellate Court.

Rehearing Denied
Oct 8/1924.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Charles F. Hess,

appellant,

vs.

John Bartmann and Emma Bartmann,

appellees,

Appeal from Circuit Court of Du Page County.

235 I.A. 626

Jones, J:

The appellant, Charles F. Hess, filed his bill of complaint in the circuit court of Du Page County against the appellees, John Bartmann and Emma Bartmann, praying that a deed absolute in form, made by him conveying to the appellees a store building in Elmhurst, Du Page County, be declared to be a mortgage and for a decree of redemption therefrom. Answers and replications were filed and the cause referred to the Master who made a report finding that the property in question was owned in fee simple by the appellees and that the appellant was a tenant therein from month to month; that he was indebted for rent from the month of March, 1925, and recommending that the decree be entered in accordance with the findings and conclusions of law and that a receiver be appointed to collect the rents, issues and profits arising from said premises pending the disposition of the case. Appellant filed objections to the Master's report, which were overruled. Upon the filing of the report in the circuit court, the appellant filed his exceptions to said report, which the court overruled and entered a decree dismissing the bill for want of equity.

The only question before the court is whether or not the deed in question was in fact a mortgage. The evidence shows that on February 25th, 1922, the complainant was the owner of a lot and a store building thereon situated in the village of Elmhurst, Du Page County; that his title thereto was subject to a mortgage of $5000, which he had borrowed from the Elmhurst State Bank. The title was further subject to the lien of a judgment in favor of Herman C. Wendland for $6907.58. The appellant

The appellant, Charles F. Voss, filed his bill of complaint in the circuit court of Du Page County against the appellees, John Bartmann and Anna Bartmann, praying that a deed absolute in form, made by him conveying to the appellees a store building in Elmhurst, Du Page County, be declared to be a mortgage and for a decree of redemption thereafter. Answers and replications were filed and the cause referred to the master who made a report finding that the property in question was owned in fee simple by the appellees and that the appellant was a tenant therein from month to month by verbal lease for one dollar per month at the time, 1922, and recommending that the latter be adjudged in default with his pleading and dismissed at his cost that a transfer be ordered to collect the rents, issues and profits arising from said premises pending the disposition of the cause. Appellant filed objections to the master's report, which were overruled. Upon the filing of the report in the circuit court, the appellant filed his exceptions to said report, which the court overruled and entered a decree dismissing the bill for want of equity.

The only question before the court is whether or not the deed in question was in fact a mortgage. The evidence shows that on February 22d, 1922, the complainant was the owner of a lot and a store building thereon situated in the village of Elmhurst, Du Page County; that his title thereto was subject to a mortgage of $3000, which he had assumed from the Elmhurst State Bank. The title was therefore subject to the lien of a judgment in favor of Norman S. Woodland for $5000.00. The appellant

was also indebted to Alonzo G. Fisher, cashier of the First National Bank of Elmhurst and to the bank in the aggregate sum of $2912.00.

The evidence further shows that he was indebted to one L. H. Schaefer in the sum of $140.12. The First National Bank had also become the owner of the mortgage to the Elmhurst State Bank. The appellant had been indebted to the appellee John Bartmann in the sum of seven or eight hundred dollars, but had paid it some months previously, so that at the time of the transfer, in question, the appellant was not indebted to the appellees.

The evidence further shows that Wendland was pressing for payment of his judgment; that Fisher was pressing for payment of the debts to the bank; and that Schaefer was threatening suit to recover his indebtedness. The appellant also had other items of indebtedness not mentioned in the bill of complaint but shown in the evidence. To meet his obligations, he proposed to sell the building to the appellee Bartmann. The negotiations were carried on from Thursday until the following Saturday.

The only conversation relating to redemption testified to by Hess was at the home of Hess, where the witness Blimke, in the presence of Bartmann and Hess said that Bartmann was ready to go through with the deal to which Hess stated, "All right; but before I go through with any deal, I want it understood that I have a right to redeem this building, in eighteen months for $16,000.;" to which Bartmann replied, "All right Charlie, I will use you right. I will give you the building back when you get the money, for $16,000." The appellee Bartmann testified concerning the meeting at Hess' home that Hess said, "Well, I am going to sell the building to you Bartmann. I am going to get out of this burg in two or three weeks. I will have a man in my place and I will be back in three or four months with lots of money and then I would like to have the building back. Will you sell it back to me?"; to which Bartmann replied "Yes" and Hess then said, "Will you consider $16,000?"; to which Bartmann replied, "Charlie, I will consider no price whatever. I can give you no price. Besides, I have to keep the building myself. Something might come up and I might have to get out

was also indebted to Alonzo G. Tiefer, cashier of the Manor National Bank of Lynwood and to the bank in the aggregate sum of $[illegible].00.

The evidence further shows that he was indebted to one E. E. Schaefer in the sum of $140.00. The First National Bank had also sued the owner of the mortgage to the Lynwood State Bank. The appellant had been indebted to the appellee John Bartmann in the sum of seven or eight hundred dollars, but had paid it some months previously, so that at the time of the transfer, in question, the appellant was not indebted to the appellee.

[illegible]

of his judgment; that Mr Bar was promising for payment of the debts to the bank; one that Lohmann was threatening suit to recover his indebtedness. The appellant also had other items of indebtedness not mentioned in the bill of complaint but shown in the evidence. In need his obligation, he proposes to sell the building to the appellee Bartmann. The [illegible].

The only conversation relating to redemption testified to by Mrs was at the home of Mrs, where the witness Hinke, in the presence of Bartmann and Mrs said that Bartmann was ready to go through with the deal to which Mrs replied, "All right; but before I go through with my deal, I want it understood that I have a right to redeem this building in eighteen months for $10,000;" to which Bartmann replied, "All right, I will do you that." [illegible] when you put the money, for $10,000." The appellee Bartmann testified concerning the meeting at Mrs' home that Mrs said, "Well, I am going to sell the building to you Bartmann. I am going to get out of this hurry in two or three weeks. I will have a man in my place and I will be back in three or four months with lots of money and then I would like to have the building back. Will you sell it back to me?" to which Bartmann replied "Yes" and Mrs then said, "Will you consider $10,000?" to which Bartmann replied, "Mrs Mrs, I will come for no price whatever. I can give you no price." Mrs Mrs, I have to keep the building myself. [illegible] I would have to [illegible]

of there. That is why I want the building and I will not consider the sale now until in two or three years." The witness Blimke was also present at this conversation and he said "Then you don't want to commit yourself?" and Bartmann replied, "No, I never do." Hess then said, "When the time comes you will treat us white anyway?", to which Bartmann replied, "I will do that."

Hess further testified that he asked Bartmann how much rent he would charge him and Bartmann told him $140 a month to which he replied that he guessed he would have to pay it. The complainant further testified that the transaction was finally consummated at the First National Bank, at which time both Hess and Bartmann were present together with Alonzo G. Fisher for the bank, Herman C. Wendland, who was there to collect his judgment and Edward Blimke to whom the complainant was indebted in the sum of about $1300. This debt was unsecured. Appellant testified that at this meeting, before the deed was passed, he stated that he would not sign it unless it was understood between the men there that he could redeem the building in eighteen months for $16,000, to which Bartmann replied, "Well, Charlie, I will use you right. I will give you back the building for $16,000."

The appellant is corroborated to some extent by the testimony of his sister-in-law, Bella Votova, and Edward Blimke. While the appellee is corroborated to some extent by the testimony of Alonzo G. Fisher, Herman C. Wendland and in some particulars by Blimke, and also by the witness Allen, who testified that he had a big part in making the sale. There is testimony in the record that at the time of the transfer the premises were not worth more than $15,000. There is also testimony that the premises were worth in the neighborhood of $21,000 at that time, while the undisputed testimony is that at the time of the hearing the premises were worth from twenty one to twenty three thousand dollars. There is no evidence in the record to show that any rate of interest was agreed upon between the parties, no evidence to show that the appellant ever paid any taxes after the transfer or kept up the insurance. There was no note taken as evidence of the alleged indebtedness. In addition to this, it is shown that the mortgage and judgment lien were

to Lando. That is why I want the building and I will not consider the [illegible] until in two or three years." The witness Mitchie was also [illegible] at this conversation and he said "When you first went to consult [illegible]?" and Lutzman replied, "No, I never do." Then then said, "Take the [illegible] you will [illegible]" In all [illegible] replied, "I will do that."

Then Lutzman testified that he asked Lutzman for what that he [illegible] like and Lutzman told him $140 a month to which he replied that he guessed he would have to pay it. The complainant further testified that the transaction was finally consummated at the First National Bank, at which time [illegible] and Lutzman [illegible] Alonzo G. Kinder for the bank, Norman G. Menifield, who was there to collect his payment and Edward Mitchie to whom the complainant was indebted in the sum of about $1300. This debt was canceled. Menifield testified that in this meeting, "before the deed was passed, Mr. Kinder said he would not sign it unless it was understood between the men that he would redeem the building in eighteen months for $18,[illegible]. [illegible] will give you back the building for $16,000."

The appellant is corroborated to some extent by the testimony of [illegible], [illegible] Claus. [illegible] is corroborated to some extent by the testimony of Alonzo G. Kinder, Norman G. Menifield and in some particulars by Mitchie, and also by the witness Allen, who testified that he had a big part in making the sale. There is testimony in the record that at the time of the transfer the premises were not worth more than $12,000. There is also testimony that the premises were worth in the neighborhood of $21,000 at that time, while the [illegible] testimony is that at the time of the meeting the premises were worth [illegible] and is [illegible] [illegible]. There is no evidence in the record to show that any note of indebtedness was agreed upon between the parties, no evidence to show that the appellant ever paid any sums after the transfer by deed to the insurance. There was no note taken by appellant for the alleged indebtedness. In addition to this, it is shown that the appellant and Lutzman were

both released and that Wendland, in order to see the transaction closed, accepted $6500 in full discharge of his judgment, which at that time with interest, exceeded the sum of $7200. The witness Blomke has never received any of his indebtedness amounting to $1300. It would serve no useful purpose to detail the testimony of the other witnesses in the case.

The law is well settled that a conveyance of land made for the purpose of securing a debt will be treated as a mortgage but to make a deed absolute in form, a mortgage, the evidence must show that it was made as a security for a debt, or dishcarge of an obligation. (Caraway v. Sly, 222 Ill. 203; Kimball v. Bundy, 302 Ill. 514; Robnett v. Miller, 303 Ill. 515.) It is well settled that one claiming a deed absolute in form is a mortgage must establish that fact by clear and convincing proof. (Kimball v. Bundy, supra; Williams v. Williams, 180 Ill. 361; Rankin v. Rankin, 216 id. 152.) It is also held that a contract of resale and reconveyance is not such an agreement as constitutes a mortgage with a right to redeem. It is said in 3 Pomeroy's Eq. Jur. 3rd Edition, Sec. 1195; "Whether any particular transaction does . . . amount to a mortgage or to a sale with a contract of repurchase, must to a large extent, depend upon its own special circumstances, for the question finally turns in all cases, upon the real intention of the parties as shown upon the face of the writings or as disclosed by the extrinsic evidence . . . . If there is an indebtedness or liability between the parties, whether a debt existing prior to the conveyance or a deed arising from a loan made at the time of the conveyance or some other cause and this debt is still left subsistent not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it, at some future time, so that the payment stipulated for in the agreement to re-convey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used and whatever stipulations they may have inserted in the instruments." This text is cited with approval in the case of Totten v.

Totten, 294 Ill. 70.

In the case before us, the evidence of the complainant taken alone is scarcely sufficient to establish anything more than a sale with a contract of repurchase. By his own testimony, he was not bound to pay the $16,000 at all events but had an option to do so. In addition to that, the stipulated rent, which must be taken as interest amounted to 11½% per annum, while in addition to that the complainant was to pay $1000 denoted interest by him. This amounted to an additional 6 2/3% of the purchase price. It is scarcely conceivable that there would be such a patent violation of the usury laws. It is also to be noted that nowhere does the complainant testify that he was to pay taxes, upkeep or insurance on the premises, which would undoubtedly be the case if he were still the owner of the property.

But, there is the further rule of law that the findings of the chancellor will not be disturbed upon appeal, unless manifestly against the weight of the evidence. (Columbus Theatre Amusement Co. v. Adsit, 211 Ill. 122; Dings v. Dings, 123 Ill. App. 318). In this case, the conclusion of the chancellor is not only not manifestly against the weight of the evidence, but in our judgment is in accord with the weight of the evidence and the decree will therefore be affirmed.

Decree affirmed.

Tylor, Int 111. 72.

In the case before us, the evidence of the claimant that claims in security sufficient to satisfy mortgages more than a mile away a contract of guarantee. By his own testimony, he was not bound at the $16,000 at all events but had an option to do so. In addition to that, the alleged debt here, which must be taken as indorsed mortgage is 11½% per annum, while in addition to that the complainant was in pay $2000 annual interest by him. This amounted to an additional 4 1/2% of the principle sum. Of a reasonably investment that there would be such a payment of interest at the every time. It is also to be noted that neither has the complainant testify that he was in fact there, upon or immediate to the premises, which would undoubtedly be the case if he were still the owner of the property.

Yet, there is the further fact of fact the finding of the chancellor will not be disturbed upon appeal, unless manifestly against the weight of the evidence. (Lumsden Theatre Company vs. Ex Parte, 221 111. 169; Ringe v. Ringe, 169 111. 1[illegible]). In this case, the consideration of the chancellor is not only not manifestly against the weight of the evidence, but it is probable in fact that the result of the finding and the decree will therefore is affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and ~~twenty~~-four.

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct. 8, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 6 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 26 General No. 7330

Horace B. Rolason, Rockford Trust Company, Joseph G. Place Andrew M. McLeish and Port Huron Company of Illinois, Defendants in error	
vs.	Writ of Error to County Court of Winnebago County.
John S. Landis, Louise Landis, Ira B. Landis, and Minnie C. Landis, Plaintiffs in Error.	

235 I.A. 627

Jones J:

The defendant in error Horace B. Rolason, filed his bill of complaint in the circuit court of Winnebago County against the plaintiff in error and the remainder of the defendants in error for the foreclosure of a mortgage. There was a decree of foreclosure, an order of sale and a sale thereunder. The premises did not bring the amount of the mortgage together with costs and expenses. Upon the coming in of the master's report, the court entered a deficiency decree for the difference, amounting to $4506.29.

The bill of complaint contained all necessary allegations for the foundation of a deficiency decree but there was no prayer for a deficiency decree in so many words. Neither was there a prayer for general relief. The only question before us on this appeal is whether or not under such a prayer in the bill of complaint, the court was authorized to enter a deficiency decree.

It appears from the abstract of the record that the prayer of the bill contains the following language; "That said defendants Ira B. Landis, John S. Landis, Louise Landis, Minnie C. Landis and Joseph G. Place may be decreed to pay to your orators whatever sum shall appear to be due them upon the taking of such an accounting together with the costs of this proceeding and solicitor's fee by a short day to be fixed by the Court and that in default of such payment such mortgaged property may be sold to satisfy the amount so found due and costs as may be directed by the court as by statute in such case made and provided."

Appeal from the Circuit Court of Winnebago County; the Hon. Dennis J. Dalsass, presiding.

Appellant Lawyer E. Flack; Andrew M. McGrath and Fort Brown, Company of Illinois, Defendants in error

Mr.

John G. Landis, Denise Landis, the L. Landis, and Joseph C. Landis, plaintiffs in error.

Issue 1:

The defendant in error Horace B. Nelson, filed his bill of complaint in the circuit court of Winnebago County against the plaintiff in error and the remainder of the defendants in error for the foreclosure of a mortgage. There was a decree of foreclosure, an order of sale and a sale thereunder. The premises did not bring the amount of the mortgage together with costs and expenses. Upon the coming in the master's report, the court entered a deficiency decree for the difference, amounting to $[illegible].

The bill of complaint contained all necessary allegations for the foundation of a deficiency decree but there was no prayer for a deficiency decree in so many words. Neither was there a prayer for general relief. The only question before us on this appeal is whether or not under such a prayer in the bill of complaint, the court was authorized to enter a deficiency decree.

It appears from the abstract of the record that the prayer of the bill contains the following language: "That said defendants Jim E. Landis, John L. Landis, Nicholas [illegible], Alonzo O. Landis and Joseph C. Hines may be decreed to pay to said orators whatsoever sum shall appear to be due them upon the taking of such an accounting together with the costs of this proceeding and complainant's fee by a short day to be fixed by the court and that in default of such payment such mortgaged premises may be sold to satisfy the amount so found due and costs as aforesaid and by the decree as by statute in such case made and provided."

The rule of law is settled that the complainant in a bill in equity cannot have any relief greater than that asked in the prayer of his bill. (Risser v. Ayers 294 Ill. 241.) Still we are of the opinion that the prayer of the bill in this case is broad enough to authorize the entry of a deficiency judgment. The prayer does not state that the mortgaged property shall or must be sold to satisfy the amount so found due, but merely that it may be sold and therefore there is nothing to justify this court in assuming that if the property is sold, it will fulfill that part of the decree which makes it obligatory upon plaintiffs in error to pay to the defendant in error Rolason whatever sum shall appear to be due upon the taking of the accounting.

It further appears from the abstract of the record that the decree contained the following. "It is therefore ordered, adjudged and decreed that the defendant pay or cause to be paid to the compalinant Horace B. Rolason, the sum of $23,674.89 with lawful interest thereon from April 2, 1922"; and further, "It is further ordered, adjudged and decreed that from the proceeds of such sale, the master in chancery shall pay the costs and from the balance pay the complainant the amount so due complainant, under this decree to the extent said balance may pay."

It is further to be noted that the record in this case is not complete. It is a familiar rule that in the absence of a complete record it will be presumed that the omitted portions of the record would have cured the errors complained of. (Culver v. Shroth 153 Ill. 437). The prayer for relief does ask for a personal judgment and the decree for foreclosure decrees a personal judgment. The findings of fact in the decree are sufficient to support a personal judgment. Taking these facts into consideration with the provisions of Section 16 of Chapter 95 of Smith-Hurd's Revised Statutes 1923, which provide that in all decrees in equity for the foreclosure of mortgages, a decree may rendered for any balance of money that may be found due to the complainant over and above the proceeds of the sale and execution

The rule of law is settled that the complainant in a bill in equity cannot have any relief greater than that asked in the prayer of his bill. (Ribber v. Ayers 284 Ill. 24.) Still we are of the opinion that the prayer of the bill in this case is broad enough to authorize the entry of a deficiency judgment. The prayer does not allege that the mortgaged property shall or will be sold to satisfy the amount so found due, but merely that it may be sold and therefore there is nothing to justify this court in assuming that if the property is sold, it will satisfy that part of the decree which makes it chargeable upon defendants in error to pay to the defendant in error Kelleher whatever may appear to be due upon the taking of the accounting.

It further appears from the evidence of the record that the [illegible] adjudged and decreed that the defendant pay or cause to be paid to the complainant Horace E. Kelleher, the sum of $[illegible].80 with [illegible] interest [illegible]. It is further ordered, adjudged and decreed that from the proceeds of such sale, the master in chancery shall pay the costs and from the balance pay the complainant the amount so due complainant, under this decree to the extent said balance may pay."

It is further to be noted that the record in this case is not complete. It is a familiar rule that in the absence of a complete record it will be presumed that the omitted portions of the record would have cured the error complained of. (Oliver v. Smith 182 Ill. 487). The prayer for relief does not for a personal judgment and the decree for foreclosure decreed a personal judgment. The findings of fact in the decree are insufficient to support a personal judgment. Nothing there shows that consideration with the provisions of Section 16 of Chapter 94 of Smith-Hurd's Revised Statutes 1933, which provides that in all decrees in equity for the foreclosure of mortgages, a decree may be entered for any balance of money that may be found due to the complainant over and above the proceeds of the sale and a execution

may issue for the collection of said balance, the same as when the decree is solely for the payment of money, we are of the opinion that the court was warranted in entering a deficiency decree.

Deficiency Decree Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty four.

Justus L. Johnson
Clerk of the Appellate Court.

401a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 627

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 6 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 32 General No. 7336

Musette Goff, Administrator of the estate of Henry F. Goff, deceased, Appellee.	)	
vs.	)	Appeal from Circuit Court of Knox County.
Chicago, Burlington & Quincy Railroad Company, a corporation Appellant	)	

235 I.A. 627

Jones J:

This case is before us for the second time. Upon the first trial, the plaintiff recovered a judgment for $25,000. Upon an appeal to this court the case was reversed upon the ground that the verdict was contrary to the manifest weight of the evidence and because of errors in instructions, and sent back for a new trial. It will be found in general number 7199. Upon the second trial, there was a verdict for the plaintiff for $15,000 upon which the court rendered judgment in favor of appellee and against appellant. To reverse this judgment, this appeal was taken.

It is not necessary at this time to make an extensive statement of the case. The material facts, which are not variant from those appearing upon the first trial are fully stated in the former opinion of this court to which reference is made. The principal grounds upon which reversal is urged at this time are that the deceased was not engaged in interstate commerce at the time of his injury and death; that the court erred in excluding certain evidence from the jury; and that the verdict is contrary to the manifest weight of the evidence.

The facts with relation to interstate commerce now appear as they did on the former trial. We then held that the deceased was engaged in interstate commerce at the time of his injury and death. That decision is the law of the case. It is therefore not necessary to discuss the point further.

The evidence excluded consisted of reports of the injury

Agenda No. 22 General No. 7555

Annette Dorf, Administrator of the estate of Henry K. Dorf, deceased, Appellee.	)
vs.	)
Chicago, Burlington & Quincy Railroad Company, a corporation Appellant	)

Appeal from Circuit Court of Knox County.

2331A 627

James J:

This case is before us for the second time. Upon the first trial, the plaintiff recovered a judgment for $25,000. Upon an appeal to this court the case was reversed upon the ground that the verdict was contrary to the manifest weight of the evidence and because of errors in instructions, and sent back for a new trial. It will be found in Vol. 237 Ill. Upon the second trial, there was a verdict for the plaintiff and the defendant in error prosecuted appeal in error to the Appellate Court for the Second District, in favor of appellee and against appellant. To reverse this judgment, this appeal was taken.

It is not necessary at this time to make an extensive statement of the case. The material facts, which are not variant from those appearing upon the first trial are fully stated in the former opinion of this court to which reference is made. The principal grounds upon which reversal is urged at this time are that the deceased was not engaged in interstate commerce at the time of his injury and death; that the court erred in excluding certain evidence from the jury; and that the verdict is contrary to the manifest weight of the evidence.

The facts with relation to interstate commerce now appear as they did on the former trial. We think that the deceased was engaged in interstate commerce at the time of his injury and death. That conclusion is the law of the case. It is therefore not necessary to discuss the point again.

The evidence excluded consisted of the injury

of Goff made by the witness Hart, who was employed by the appellant at that time. This report was in some respects contradictory to his testimony on the trial. He was asked with respect to the various questions and answers in his report and gave answers to them. Afterward the instruments were offered in evidence and rejected. While, under the repeated holdings of the Supreme Court, the error is held not to be prejudicial, because the appellant had the full benefit of the excluded reports, nevertheless, they might well have been admitted.

Upon the question of the sufficiency of the evidence to sustain the judgment, we have arrived at the same conclusion expressed in our opinion on the former trial. While it is contended that the evidence is materially different from that at the first trial, a careful examination of the abstract in each case shows that the changes in the evidence are mainly in contradiction of appellant's witnesses and are of an impeaching character. None of the additional testimony is affirmative in support of the appellee's case.

Upon the former appeal we said "This verdict must, of necessity, depend largely, if not entirely, upon the evidence of Hart. Take his evidence out of the case and there is positively nothing left upon which to sustain the cause of action. Hart is not only contradicted on almost every important point but he has made statements out of court so contradictory to his statements in court, that the force of his evidence is very much weakened. We do not think the evidence is sufficient to support the verdict and for this reason, the judgment will have to be reversed." A careful examination of Hart's testimony shows that it is practically the same as on the former trial. A statement of it will be found in our former opinion. He is likewise contradicted upon this trial in every essential as he was on the former trial. We must again hold that the evidence in this case will not sustain the verdict. The cause will therefore be reversed and remanded.

Reversed and Remanded.

at that date by the witness [illegible], and was admitted by the appellant at that time. This report was in some respects contradictory to his testimony on the trial. He was asked with respect to the various questions and answers in his report and [illegible] answers to them. Afterward the instruments were offered in evidence and rejected. While, under the repeated holdings of the Supreme Court, the error is held not to be prejudicial, because the appellant had the full benefit of the excluded reports, nevertheless, they might well have been admitted.

Upon the question of the sufficiency of the evidence to sustain the judgment, we have arrived at the same conclusion expressed in [illegible] opinion on the former trial. While it is contended that the evidence is materially different from that at the first trial, a careful consideration of the [illegible] [illegible] that the change in the testimony was mainly in contradiction of [illegible] evidence and for this [illegible] [illegible]. None of the additional testimony is affirmative in support of the plaintiff's case.

[illegible] the former appeal we held [illegible] evidently, [illegible], if not entirely, upon the evidence of [illegible]. [illegible] and [illegible] tically nothing left upon which to determine the cause of action. This is not only contradicted on almost every important point but [illegible] probability [illegible] [illegible], that the force of his evidence is very much weakened. We do not think the evidence is sufficient to support the verdict and for this reason, the judgment will have to be reversed. [illegible] it is practically the same as on the former trial. A statement of it will be found in our former opinion. As it [illegible] was on the former trial. We must again hold that the evidence [illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of Sept. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

40-11

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 6 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 35 General No. 7340

Theodore Bontjes, Appellee	)	
	)	
vs.		Appeal from
	)	Peoria County.
The Sweney Gasoline and Oil Company, a corporation, Appellant.	)	

235 I.A. 627

Jones J:

The appellee recovered a judgment of $808 against the appellant in the circuit court of Peoria County for injuries sustained by him in filling the gasoline tank of a motorcycle at the filling station conducted by the appellant in the city of Peoria. On June 11, 1922, about 8:30 in the evening, the appellee rode his motorcycle to the filling station of appellant to buy some gasoline. He opened the top of one of the tanks and a servant of the appellant started to fill it. There was a fire which caught the clothing of the appellee and he was severely burned.

It is first insisted that the amended declaration is so defective that it cannot sustain the judgment. The declaration consisted of one count only and alleged that the servant of the appellant negligently poured the gasoline into the headlight of the motorcycle, causing it to ignite whereby the plaintiff was severely burned and injured. It is said that the declaration fails to charge any obligation or duty upon the part of the defendant to protect the plaintiff from injury; that the defendant failed to discharge such duty or that the injury resulted from that failure. It is not necessary that the declaration directly charge the duty of the defendant but it is sufficient if it states facts from which the duty of the defendant toward the plaintiff arises. The declaration sufficiently charges the failure of the defendant to discharge its duty and that the injury to the plaintiff resulted from such failure. In addition to this,

Theodore Kontjes,
Appellee,

vs.

The Sewney Gasoline and Oil Company, a corporation, appellant.

Appeal from Peoria County.

Jones J:

The appellee recovered a judgment of $800 against the appellant in the circuit court of Peoria County for injuries sustained by him in filling the gasoline tank of a motorcycle at the filling station conducted by the appellant in the city of Peoria. On June 11, 1922, about 8:30 in the evening, the appellee rode his motorcycle to the filling station of appellant to buy some gasoline. He opened the top of one of the tanks and a servant of the appellant started to fill it. There was a fire which caught the clothing of the appellee and he was severely burned.

It is first insisted that the amended declaration is so defective that it cannot sustain the judgment. The declaration consisted of one count only and alleged that the servant of the appellant negligently poured the gasoline into the headlight of the motorcycle, causing it to ignite whereby the plaintiff was severely burned and injured. It is said that the declaration fails to charge any obligation or duty upon the part of the defendant to protect the plaintiff from injury; that the defendant failed to discharge such duty or that the injury resulted from that failure. It is not necessary that the declaration directly charge the duty of the defendant but it is sufficient if it states facts from which the duty of the defendant toward the plaintiff arises. The declaration sufficiently charges the failure of the defendant to discharge its duty and that the injury to the plaintiff resulted from such failure. In addition to this,

the demurrer to the declaration was overruled and the appellant joined issue. Therefore, the question before this court is whether or not the declaration, though defective, is sufficient to sustain the judgment. Where the issues upon the declaration and the plea of general issue are such that they necessarily require proof upon the trial of the facts defectively or imperfectively stated or omitted, such defect imperfection or omission is cured by the verdict. Hartrich v. Hawes 202 Ill. 344. We think the declaration sufficient in this case to sustain the judgment.

It is next insisted that there was a fatal variance between the proof and the charge of the declaration in that the proof shows that the gasoline ignited from contact with the heated motor of the machine and no from being poured into the headlight.

It is contended by the appellant in his argument that the declaration charges that the servant, instead of putting the gasoline into the tank provided for it, deliberately poured it into the headlight. There is no merit whatever in this contention. The declaration charges that "The servant carelessly and negligently poured said gasoline into and on the flame then and there burning in said headlight on said motorcycle." It was not necessary to prove that the attendant intentionally poured the gasoline into the headlight but only that by his negligence he did pour it into the headlight.

It is next insisted that the verdict is against the manifest weight of the evidence and that the evidence shows that the gasoline was ignited by coming in contact with the heated motor of the motorcycle and not from coming in contact with the headlight. The plaintiff testified that the defendant jerked the nozzle out of the tank and in so doing threw the gasoline on and into the headlight and so ignited it. The attendant testified that the gasoline overflowed and the gasoline ran onto the heated motor. Other witnesses testified in favor of the defendant but we cannot say that they were all in as favorable a position as the plaintiff to observe the start of the flame and certainly

since they were not expecting it, they were not so intent upon what was being done at plaintiff's motorcycle as was the plaintiff himself. It is for the jury in such cases to say what the facts in the case really are. In this case we cannot say that the verdict is so manifestly against the weight of the evidence that the judgment should be set aside.

Appellant contends that the case falls within the rule that where an uncorroborated witness for the plaintiff testifies to one state of facts and a witness for the defendant, of equal credibility, corroborated by another witness testifies to another state of facts and there are no elements of probability to turn the scale, the plaintiff's case is not proven and the judgment should be reversed. Here there are facts and circumstances in evidence to turn the scale. Plaintiff testified that the attendant's attention was atttracted to a car, that drove up as he filled the tank. This is not denied. Again, all of the witnesses, who testify in corroboration of the attendant say their attention was attracted by the flash. They did not see the beginning of the fire and could not know in which place it started. Once started it would ignite the gasoline on the motor and on the floor. The case falls within the reasoning of West Chicago R. R. Co. v. Lieserowitz 197 Ill. 607.

An appellate court will not reverse a judgment upon evidence that is apparently equally balanced but the Appellate Court must be satisfied that the judgment is against the manifest weight of the evidence. Where the evidence is close, it is for the jury to say upon which side it preponderates. It is only in a case where the jury from misapprehension or prejudice has rendered a verdict contrary to the manifest weight of the evidence that this court will interfere with such verdict. (McKey v. Ester. 157 Ill. App. 168; Wickert v. Crosthwait 165 Ill. App. 586; Greenwald vs. Weinberg 175 Ill. App. 439.)

It is insisted that two instructions given for the appellee were erroneous. We have examined them and they state correct

propositions of law. It is also insisted that the court incorrectly refused to give appellant's refused instructions Numbers I, 2, 3, 4, 6, and 9. We have examined these instructions and find that refused instructions numbers 4 and 6 were erroneous in that they take from the jury the question of whether a failure on the part of the appellee to turn out the headlight on his motorcycle amounted to contributory negligence. But they assume that such failure on the part of appellee would be negligence sufficient to bar the appellee from recovery. (Nelson v. Knetzger 109 Ill. App. 296.) The substance of instruction number 9 is sufficiently covered in the instructions given by the court for the appellee. While instructions numbers I, 2, and 3 might have been given by the court, still we do not believe that their refusal is such error as necessitates a reversal of the case.

Since we find no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of Sept. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

40/2a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 627

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 6 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7348 Agenda No. 38

Bernard Kelly Administrator of the estate of Minnie Loving, deceased Appellant,

vs.

Eldridge Benton, Appellee

Appeal from Circuit Court of Peoria County.

235 I.A. 627

Jones J:

The appellant Bernard Kelly, Administrator of the estate of Minnie Loving deceased, filed this suit in the circuit court of Peoria County against the appellee Edlridge Benton for the recovery of damages for the death of appellant's intestate caused by injuries received by her, when an automobile operated by the appellee struck her. The declaration is in two counts, fhe first alleging general negligence in the operation of the automobile and the second charging the driving of the automobile at a dangerous rate of speed. There was a trial by jury and a verdict for the defendant upon which the court entered a judgment, in bar of the action and for costs. From that judgment this appeal is prosecuted.

The facts are that Minnie Loving in company with her husband and Irma Droll and Charity Droll were walking north along the concrete highway near Mossville in Peoria County on the night of the 20th of November 1921. They were on the right hand side of the pavement. The defendant was travelling northward on the same side of the pavement. As he approached the party, a car coming from the opposite direction, showing glaring headlights passed the party. The defendant dimmed or turned out his heddlights in obedience to the Motor Vehicle Law. The defendant did not see the party in time to avoid striking the deceased. She was injured so severely that she died two days later. For a reversal of this case, the appellant contends that the deceased was in the exercise of due care and caution for her own safety; that the greater weight of the evidence

Decided: [illegible], 1942 | Docket No. [illegible]

Patrick Kelly (Administrator of the estate of Alexis Lerton, Deceased) Appellant,	
vs.	Appeal from Circuit Court of [illegible] County.
Elizabeth Burton, Appellee	

Jones C:

The appellant Patrick Kelly, administrator of the estate of Alexis Lerton, deceased, filed this suit in the circuit court of Tenth County against the appellee Elizabeth Burton for the recovery of damages for the death of appellant's intestate caused by injuries received by her, due to negligence alleged by the appellee struck her. The declaration is in two counts, the first charging general negligence in the operation of the automobile and the second charging the driving of the automobile at a dangerous rate of speed. There was a trial by jury and a verdict for the defendant upon which the court entered a judgment, in bar of the action and for costs. From that judgment this appeal is prosecuted.

The facts are that Alexis Lerton in company with her husband and two small sons driving their Ford were visiting cousins on the concrete highway near Moorsville in Peach County on the night of the 20th of November 1921. They were on the right hand side of the pavement. The defendant was travelling northward on the same side of the pavement. As he approached the party, a car coming from the opposite direction, showing glaring headlights caused the party. The defendant claims he signal and [illegible] to [illegible] for the [illegible] car. The testimony tends to show that the party in time to avoid striking the deceased. The car, inclined to swerve, that she died two days later. There several of this case, the principal contention was in the evidence of the [illegible] in [illegible] the driver, that the proximate cause of the collision

shows the defendant was guilty of negligence and that the court erred in modifying plaintiff's instruction 17 and in giving instruction numbers 3, 6, 8 and 19, on behalf of the defendant.

We have carefully examined all of the evidence in this case and find that it was of such a conflicting nature that it cannot be wholly reconciled. The testimony differs as to whether the deceased was walking on the concrete highway at the time she was struck or whether she was walking on the dirt shoulder at the right hand side of it. The evidence shows that the decedent and her husband, with whom she was walking, both knew that many motor vehicles used that highway and both knew that there was a car approaching them from behind. It further shows that neither of them looked around to see where the car was or to ascertain whether the driver was aware that they were on the road or to learn the position of the car. There is a conflict in the evidence with respect to the distance travelled by defendant's car after he struck the deceased. This is important only as it bears upon the speed at which the automobile was travelling. There is also a conflict in the evidence as to whether the defendant turned out his lights or dimmed them only, and there is a conflict in the evidence with respect to whether the headlights of the car, which met the defendant were so bright as to prevent the defendant from seeing anyone on the highway. The accident occurred shortly after midnight on a very dark night. The party had been dancing at a pavilion in the village of Rome.

The right to use the public highway extends alike to all persons, whether pedestrians or drivers of vehicles and the duty is upon all alike to exercise due care and caution for their own safety and for the safety of all other persons using the highway. (Graham v. Hagmann 270 Ill. 252) It was as much the duty of the deceased to exercise due care in ascertaining the approach of automobiles as it was the duty of the defendant to ascertain the presence of the deceased upon the highway. Their rights and duties in the highway were reciprocal. In the use of the highway, each is bound to give way sufficiently to permit

the other to pass. In this case it became the duty of the deceased to turn to the right in time to permit the defendant to pass upon the left, and it was no less the duty of the defendant to drive to the left so that he might safely pass the deceased.

It was for the jury to say whether, under all the evidence in the case, the deceased was guilty of contributory negligence and whether the defendant was guilty of negligence or whether the injury and death of the deceased was the result of inevitable accident for which no one was to blame. There is, as we have seen, evidence from which the jury might have found that the deceased was guilty of contributory negligence. There is like testimony from which the jury might have found that the defendant was guilty of negligence resulting in the injury or that the death of deceased was the result of inevitable accident, for which no one was to blame. It is for the jury to pass upon these questions and where, as in this case, the evidence is of a conflicting nature, this court would not be justified in interfering with the verdict of the jury solely upon the question of the weight of the evidence. To do so would be to deprive the parties of the right of trial by jury. It is only in a case where the verdict is manifestly against the weight of the evidence, that this court would be justified in setting aside the verdict. (McKey v. Ester 157 Ill. App. 168; Wickert v. Crosthwait 163 Ill. App. 586 Greenwald v. Weinberg 174 Ill. App. 439 .)

Instruction number 17 to which the plaintiff makes objection tells the jury, in substance, that if the defendant knew or in the exercise of due care and caution should have known that he was approaching the deceased that it then became his duty to give warning of his approach and to fail to do so was negligence upon his part. The instruction as tendered made it the absolute duty of the defendant to know that the deceased was upon the highway, while the instruction as given only required him to use reasonable care to ascertain whether the deceased was on the highway. We are of the opinion that the instruction as tendered

the other to pass. In this case, the deceased found the duty of the deceased to turn to the right in view to permit the defendant to pass upon the left, and it was on the duty of the defendant to drive to the left so that he might safely pass the deceased.

It was for the jury to say whether, under all the evidence in the case, the deceased was guilty of contributory negligence and whether the defendant was guilty of negligence or whether the injury and death of the deceased was the result of inevitable accident for which no one was to blame. There is, as we have seen, evidence from which the jury could have found that the deceased was guilty of contributory negligence. There is also evidence from which the jury could have found that the defendant was guilty of negligence. Nothing in the falsity of that the death of deceased was the result of inevitable accident, for which no one was to blame. It is for the jury to pass upon these questions and there, as in this case, the evidence is of a conflicting nature, this court would not be justified in interfering with the verdict of the jury solely upon the question of the weight of the evidence. To do so would be to deprive the parties of the right of trial by jury. It is only in a case where the verdict is manifestly against the weight of the evidence, that this court would be justified in setting aside the verdict. (Kelley v. Lehner 157 Ill. App. 164; Klement v. Crosbywait 163 Ill. App. 444 Freemwald v. Reinhoeny 174 Ill. App. 429.)

Instruction number 17 to which the plaintiff makes objection tells the jury, in substance, that if the defendant knew or in the exercise of due care and caution should have known that he was approaching the deceased that it then became his duty, to give warning of his approach and to fail to do so was negligence and his fault. The instruction as tendered and if the jury duty of the defendant to know that the deceased was upon the highway, is the instruction : a given only, requiring him to use reasonable care in ascertain whether the deceased was on the highway. In lieu of the phrase that the instruction of interest

states the law correctly. (Graham vs. Hagmann, Supra) But even if we concede that it is erroneous still the giving of it is not reversible error for the reason that it is shown by the plaintiff's own evidence that the deceased knew of the approach of the automobile from behind. A warning therefore could not add anything to her notice, and the failure to give it could not be the proximate cause of the injury.

While instruction number 3 does not state the law as accurately, as it might, nevertheless, the propositions embraced therein substantially state the law. Instruction number 4 states the law correctly. It is urged that the giving of instruction number 6 which told the jury that the fact that the plaintiff's deceased was injured in the accident and died from such injury is not evidence in itself that the defendant was guilty of the nelgigence charged. We see no error in giving this instruction. The 8th instruction complained of tells the jury that if the injury was the result of a mere accident for which no one was to blame there can be no recovery. This Court has approved this instruction. (Webster Mfg. Co. V. Nisbett 87 Ill. App. 551.) The 19th instruction bears upon the weight to be given the testimony of the witnesses and tells the jury that they have a right to take into consideration the interest of the witnesses, if any, in the result of the suit and the relation of any witness to any of the parties to the suit. This instruction was properly given. (Brown v. Walker 32 Ill. App. 199).

A careful inspection of the record in this case fails to disclose any serious error and the judgment will therefore be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 8th day of Sept. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct 9, 1924.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 6 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 41 General No. 7351

Harriet Baldwin Appellant	)	
vs.	)	Appeal from Circuit Court of Peoria County.
Peoria Railway Co. Appellee.	)	

235 I.A. 627

Jones J:

Harriet Baldwin, plaintiff below, filed her suit in the circuit court of Peoria County against the Peoria Railway Company, defendant, for the recovery of damages for injuries sustained by her in a collision between an automobile in which she was riding and a street car operated by the defendant. The declaration consisted of seven counts of which four were dismissed. The case was tried on the 2nd, 6th and 7th counts. The second count charged negligence in operating the street car. The sixth charged that the defendant negligently failed to have on the front of the street car, a signal light capable of being seen by persons approaching the street car. And the seventh count charged negligence in not having a signal light on the front of the street caw, as required by an ordinance of the city of Peoria. The defendant pleaded the general issue. There was a trial and a verdict for the defendant. The court overruled the plaintiff's motion for a new trial and entered judgment against her in bar of the action and for costs. From that judgment she prosecuted this appeal.

The errors relied upon for reversing the judgment are the exclusion of evidence offered by the plaintiff; the giving of erroneous instructions for the defendant and the refusal to grant a new trial upon the grounds of newly discovered evidence. The plaintiff was riding in the front seat of an automobile driven by Peter Bonjean northward on the east side of South Adams Street in the city of Peoria. Gerland McNeill and Verna Anderson were in the back seat of the car. Defendant's car was travelling southwar on its tracks located 13½ feet from the east curb of the

Agenda No. 41 General No. 7861

Harriet Baldwin,
Appellee,

vs.

Peoria Railway Co.
Appellant.

Appeal from Circuit
Court of Peoria
County.

93 Ill. App. 627

Jones J:

Harriet Baldwin, plaintiff below, filed her suit in the circuit court of Peoria County against the Peoria Railway Company, defendant, for the recovery of damages for injuries sustained by her in a collision between an automobile in which she was riding and a street car operated by the defendant. The declaration consisted of seven counts of which four were dismissed. The case was tried on the 2nd, 6th and 7th counts. The second count charged negligence in operating the street car. The sixth charged the defendant negligently failed to have on the front of the street car, a signal light capable of being seen by persons approaching the street car. And the seventh count charged negligence in not having a signal light on the front of the street car, as required by an ordinance of the city of Peoria. The defendant pleaded the general issue. There was a trial and a verdict for the defendant. The court overruled the plaintiff's motion for a new trial and entered judgment against her in bar of the action and for costs. From that judgment she prosecuted this appeal.

The errors relied upon for reversing the judgment are the exclusion of evidence offered by the plaintiff; the giving of erroneous instructions for the defendant and the refusal to grant a new trial upon the grounds of newly discovered evidence. The plaintiff was riding in the front seat of an automobile driven by Peter Bomjean northward on the east side of South Adams Street in the city of Peoria. Overland Kimball and Verne Anderson were in the back seat of the car. Bomjean's car was travelling north-wer on the tracks located 18½ feet from the east curb of the

street and 23.3 feet from the west curb. The collision occurred about eleven o'clock at night. There was no turn in the street or obstructions sufficient to obscure the approaching cars from each other. There was a decided conflict in the evidence with respect to whether the headlight was burning on the street car. Oran Bogart, then a policeman, testified that he was on South Adams Street at the time of the accident; that the automobile in which plaintiff was riding passed him going 45 to 55 miles an hour; that he saw the street car approaching two or three blocks away; that it had a headlight burning brightly and that the automobile drew first to the east curb and then diagonally across the first rail of the street car line until it collided with the street car. The motorman of the street car and two or three witnesses testified that a headlight was burning. The plaintiff and the driver of the automobile and others testified that the headlight was not burning. In this state of the evidence, the plaintiff offered to prove by testimony of a police officer at the central station that at the time of the accident, Bogart was a mile from the place of the accident calling up the officer to report in line with his duty. The court excluded this testimony upon objection by the appellee. An examination of the abstract, however, fails to show any foundation was laid for it.

But the most serious objection arises in the giving of instructions on behalf of the defendant. Instruction No.2 told the jury that before the plaintiff could recover she must prove by the greater weight of all the evidence "all of the material allegations in some one of the remaining counts in the declaration and if she has failed to do so, should find the defendant not guilty." While the Supreme Court has held in the case of Harvey v. Chicago & Alton Railroad Company 221 Ill. 242 that giving this instruction is not reversible error, nevertheless the giving of it is not approved. The instruction leaves to the jury the determination of what are the material allegations of the declaration. Instruction No. 4 told the

jury that if the motorman used ordinary care to avoid a collision with the automobile, then the jury should find the defendant not guilty. Had this instruction been limited to the second count of the declaration, it would have been good but counts 6 and 7 charge negligence in the failure to have a headlight burning. The evidence does not show that the care of the headlight is part of the duty of the motorman, thus the negligence of someone else might be the proximate cause of the injury. Yet this instruction directs a verdict. Instructions Numbers 11 and 12 contain the same vice.

Instruction No. 5 informed the jury that if they believed that the material evidence on the issue of negligence involved in the case was equally balanced and that the plaintiff had failed to prove her case by the weight of all the evidence they should return a verdict finding ~~plaintiff~~ defendant not guilty. This instruction is erroneous in leaving to the jury the determination of what the material evidence is. That is for the court to determine upon the admission and exclusion of evidence offered. Instruction number 8 is to the effect that if the plaintiff was riding in an automobile driven by another and just before the time of the collision knew or ought to have known that the automobile was being carelessly driven and was in immediate danger of collision with the street car, it then and there became the plaintiff's duty to exercise reasonable care for her own safety and "to warn the driver of the automobile and a failure to do so would amount to negligence on the part of the plaintiff." This instruction is erroneous in two particulars. It told the jury that the plaintiff, in the exercise of reasonable care for her own safety, should warn the driver. This invades the province of the jury. (C.B. & Q. R. R. Co. v. Gunderson 174 Ill. 495.) It is for the jury to say what, under the circumstances, would be the exercise of reasonable care. It further invades the province of the jury by taking from them the determination of what would amount to negligence under the circumstances. (Ill. Cent. R. R.

jury that if the motorman used ordinary care to avoid a collision with the automobile, then the jury should find the defendant not guilty. The jury instructions been limited by the request on of the defendant. It would have been just as accurate if not a little explicit to tell the jury that a single negligence in the driver of the automobile, the negligence of someone else plus on the premises where of the injury, had caused injuries to a pedestrian. Instructions Numbers 11 and 12 contain the same vice.

Instruction No. 9 informed the jury that if they believed that the material evidence on the issue of negligence involved in the case was equally balanced and that the plaintiff had failed to prove her case by the weight of all the evidence they should return a verdict finding ~~[illegible]~~ not guilty. This instruction is erroneous in leaving to the jury the determination of what the material evidence is. That is for the court to determine upon the admission and exclusion of evidence offered. Instruction number 8 is to the effect that if the plaintiff was riding in an automobile driven by another and just before the time of the collision knew or ought to have known that the automobile was being carelessly driven and was in immediate danger of collision with the street car, it then and there became the plaintiff's duty to exercise reasonable care for her own safety and "to warn the driver of the automobile and a failure to do so would amount to negligence on the part of the plaintiff." This instruction is erroneous in two particulars. It told the jury that the plaintiff, in the exercise of reasonable care for her own safety, should warn the driver. This invades the province of the jury. (U.R. & J. R. R. Co. v. Gunderson 174 Ill. 494.) It is for the jury to say what, under the circumstances, would be the exercise of reasonable care. In another instruction the province of the jury by taking from them the determination of what would ~~[illegible]~~ be negligence under the circumstances. (Ill. Cent. R.

V. Griffin 184 Ill. 9).

Instruction No. 13 told the jury that the automobile in which plaintiff was riding was being driven on a public highway through the residence district, of an incorporated city and in addition sets forth the statute with respect to speed and what constitutes prima facie evidence of negligence. There is a conflict in the evidenne about whether the scene of the accident was in a residence portion of the city of Peoria. Whether or not it was a residence portion of the city was for the jury to determine and not for the court. This instruction invaded the province of the jury. (Allmendinger v. McHie 187 Ill. 308.)

Plaintiff complains that a new trial was denied after a proper showing of the discovery of new evidence but that question need not be considered by us because the case must be reversed for the errors indicated and plaintiff will have ample opportunity to secure the new evidence at another trial of the cause.

Since the case must be submitted to another jury, we have purposely avoided setting forth the testimony in any great length in order to refrain from expressing any opinion with respect to its weight.

The cause will be reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

5

Rehearing Denied
Oct. 15, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 628

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 6 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 47 General No. 7360

235 I.A. 628

Amanda Yahnke, Appellee

vs.

Adolph Klavohn, Executor of the Last Will and Testament of John Klavohn, Sr., deceased, Appellant,

Appeal from Circuit Court of Henry County.

Jones J:

The appellee Amanda Yahnke, filed her claim against the estate of John Klavohn, Sr., deceased, on a note for $8,000. There was a hearing in the County Court and the claim was denied. On appeal to the circuit court there was a trial by jury and a judgment for the full amount of the note. It appears that no pleadings were filed in the county court, but that in the circuit court the appellant filed three pleas, the general issue, want of consideration and a denial that the note was executed, by the deceased, John Klavohn.

It is urged for a reversal of this case that the verdict is contrary to the evidence; that the court erred in excluding certain testimony offered by the defendant and in giving the first, second, third, fourth, fifth, sixth, and eighth instructions for the appellee and in modifying appellant's instruction number 26 and refusing appellant's instructions 30, 31, 32, and 33.

The only evidence offered by the claimant to prove the signature of the deceased to the note was the testimony of the claimant's daughter Sylvia Yahnke, who was fourteen years of age at the time of the trial. She testified that she saw her grandfather write his name many times when she was about eight years old and that she had never seen him write it since that time. She testified further that she had seen her grandfather's signature about ten days before the trial as it appeared where he had written it on several books and magazines kept by her mother. The witness does not testify that she saw him write his name on the books and magazines nor is there any proof that his name, as written on them, was the genuine signature of the deceased. The witness further testified that she had not compared the signature to the note in question with these signatures and on cross examination was somewhat contradictory with respect to seeing the signatures of her grandfather a short time

fore the trial.

On the other hand the banker with whom the deceased did business for years and who frequently saw him write his name and frequently cashed eks and handled other instruments signed by the deceased, testified that signature on the note was not that of the deceased. Two of the sons of deceased who had seen him write his name many times and who had seen his nature on various legal instruments also testified that the signature was that of the deceased.

The burden of proof in this case is upon the claimant to establish the cution of the note by a preponderance of the evidence. (Sec. 52 Chap. 110, th-Hurd Revised Statutes). And where the verdict of the jury is clearly manifestly against the weight of the evidence it becomes our duty to erse and remand the cause for a new trial. (Belden vs. Innis 84 Ill. 78; elson vs. East St. Louis Railway Company 235 Ill. 625; and Kirsch vs. of 106 Ill. App. 639.) A verdict on conflicting testimony may be set de as against the weight of the evidence where the verdict is based on testimony of one witness, contradicted by three others who are corroborted by all the circumstances and inferences to by drawn from the evidence. chette vs. Williamson County Coal Company 188 Ill. App. 321: See also slee vs. Glass 61 Ill. 94 and Heide vs. Schubert 166 Ill. App. 586.)

In this case the testimony of Sylvia Yahnke is uncorroborated and it is satisfactory because of her age at the time she saw her grandfather write name and also because of her uncertainty on cross examination with respect the signatures she had seen before the trial. On the other hand the tnesses for the appellant are corroborated to some extent by the circumtances of the case. In our judgment the verdict is clearly and manifestly ainst the weight of the evidence.

The executor offered to prove the value of the estate of John Klavohn ., for the purpose of showing that the total value of the estate was much s than the amount of the claim, both by the direct testimony of the exetor who had knowledge of it and by offering the inventory filed in the estate evidence. This the Court denied. There was no error in this ruling. rier vs. Barkley 182 Ill. App. 541.) Neither was there any error in fusing to admit in evidence the promissory note claimed to have been executed Amanda Yahnke and her husband and payable to the deceased. An examination

of the abstract and record shows the debt to have been that of the husband of the claimant and that she was merely a surety.

The first, second, third and fourth instructions given on behalf of the claimant and objected to by the appellant are not open to the criticisms made against them. It is said that the 5th instruction tells the jury that the note was in fact executed. A careful reading of the instruction discloses that it does not do so, but it is so worded that it is calculated to mislead the jury into believing that it did tell them that the note was actually executed. For this reason the instruction should not have been given in the form in which it appears. Objection is made to the 6th instruction upon the ground that it attempts to define preponderance of the evidence without stating all of the essential elements, to be considered by the jury in determining where the preponderance of the evidence lies. We believe the objection is well taken.

The court properly modified the executor's instruction number 23. As modified it states a correct proposition of law. Appellant's refused instruction number 30, did not correctly state the rule of law sought to be presented to the jury in that it tells them that if they believe that any witness, or witnesses have wilfully sworn falsely to any material fact in the case the jury may disregard such testimony of the witness or witnesses so far as the jury may believe it false. The rule is that they may disregard the entire testimony of such witnesses except in so far as it is corroborated by the testimony of other credible witnesses or by facts and circumstances appearing in evidence. Appellant's refused instruction number 31 is covered by other instructions. Refused instruction number 32 is covered by appellant's instruction number 25. Refused instruction number 33 is covered by appellant's instruction number 13.

The appellant contends that the instrument sued upon by the claimant is not a promissory note. This argument is based upon the fact that while it is written upon an ordinary form promissory note, the blanks for the personal pronoun "I" and blanks for the time of payment are

not filled. There is an implied power to fill blanks which extends to all parts of the paper, even to the promise itself and the pronoun "I" or "We" may be inserted. (8 C.J. 183).

In Packer v. Roberts, 140 Ill. 9, a promissory note with warrant of attorney to confess judgment was delivered with the blanks in the warrant of attorney for filling in of pronouns. The personal pronouns "I", "my" and "me" were omitted. Judgment was entered without the blanks having been filed and it was held by the court that since the words omitted from the blanks according to the natural interpretation could be no other than "I", "my" or "me" and they could refer to no other person than the signer that the intention of the instrument was clear and it was enforcible. Upon the same principle, we think that the omission of the pronoun "I" in this note cannot effect the validity of the instrument. The failure to state the time of payment made the instrument a demand note. (Negotiable Instruments Law, Sec.7). For these reasons the court ruled correctly upon the question of the form and nature of the instrument.

For the errors herein indicated, the judgment must be set aside and the cause remanded for a new trial.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 4 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7313 13.

Village of Lake Zurich,
Defendant in error,
vs.
Frederick Deschauer & Elmer Deschauer,
Plaintiffs in error.

235 I.A. 628

Error to the Circuit Court of Lake County.

Jett, P. J.

This is a suit instituted by the Village of Lake Zurich, defendant in error, by the issuing of a summons by a police magistrate of the County of Lake, against Frederick Deschauer and Elmer Deschauer, et al, to recover a sum defendant in error claimed to be due it from the plaintiffs in error for failure to comply with an ordinance of said Village. A trial was had before the police magistrate and a judgment was rendered against plaintiffs in error in the sum of $50.00 and costs of prosecution.

An appeal was prosecuted by the plaintiffs in error to the Circuit Court of Lake County. In the Circuit Court all defendants were dismissed out of the case except plaintiffs in error. The cause was tried by the court without the intervention of a jury, and judgment was rendered in favor of defendant in error and against the plaintiffs in error for the sum of $60 and costs of suit, from which judgment plaintiffs in error have sued out this writ of error.

The defendant in error is a municipal corporation. At the time this suit was brought the said Village, the defendant in error, had an ordinance in force entitled "An ordinance regulating and licensing ice cream parlors and stands, soft drink parlors and stands and coffee houses and stands," which ordinance is in the words and figures following: Be it ordained by the President and Board of Trustees of the Village of Lake Zurich, Illinois.

VERS

Village of Lake Zurich,

Defendant in error,

vs.

Frederick Deschamer & Elmer Deschamer,

Plaintiffs in error.

Error to the Circuit Court of Lake County.

38711.A. 628

Lott, J. 1.

This is a suit instituted by the Village of Lake Zurich, defendant in error, by the issuing of a summons by a police magistrate of the County of Lake, against Frederick Deschamer and Elmer Deschamer, et al, to recover a sum defendant in error claimed to be due it from the plaintiffs in error for failure to comply with an ordinance of said Village. A trial was had before the police magistrate and a judgment was rendered against plaintiffs in error in the sum of $80.00 and costs of prosecution.

An appeal was prosecuted by the plaintiffs in error to the Circuit Court of Lake County. In the Circuit Court all defendants were discharged out of the case except plaintiffs in error. The cause was tried by the court without the intervention of a jury, and judgment was rendered in favor of defendant in error and against the plaintiffs in error for the sum of $80 and costs of suit, from which judgment plaintiffs in error have sued out this writ of error.

The defendant in error is a municipal corporation. At the time the this suit was brought the said Village, the defendant in error, had an ordinance in force entitled "An ordinance regulating and licensing ice cream parlors and stands, soft drink parlors and stands and coffee houses and stands," which ordinance is in the words and figures following: Be it ordained by the President and Board of Trustees of the Village of Lake Zurich, Illinois.

Section 1. It shall be unlawful to conduct any ice cream parlor or stand, or any soft drink parlor or stand, where any malt, vinous, mixed or fermented drink is sold, or any coffee house or stand without first obtaining the license provided for in this ordinance.

Section 2. Any person, firm or corporation desiring to conduct such a place shall file with the Village clerk his application setting forth the proposed location, the name of the applicant, or owners of the firm or name of corporation and the President thereof and the kind of business proposed and shall accompany the same with the license fee provided herein. If it shall appear that the applicant has complied with the terms of this ordinance the President of the Board of Trustees shall issue a license.

Section 3. Each license, except as hereinafter provided, shall be for a term ending the following day, providing that an annual license asked for after January and before May first, shall be one of half of the annual fee.

Section 4. A stand as herein used shall be taken to be any uninclosed place where any of the articles herein mentioned are sold.

Section 5. The fee for ice cream parlor shall be $50.00 per annum for the fountain or counter and $2.00 per annum additional for each table whereon ice cream is served, the fee for an ice cream stand shall be $50.00, the fee for a soft drink parlor or stand where malt, vinous, mixed or fermented drinks are sold shall be $125.00, the fee for a coffee house or stand shall be $35.00, the fees mentioned in this section are the annual fees.

Section 5a. In line of the above fees, the licensee may at his option in the case of a stand pay a daily or monthly fee providing said fee shall be paid in advance of the day or month in question. The daily fee for an ice cream stand shall be $10.00, the monthly fee for an ice cream stand shall be $35.00, the daily fee for a soft drink stand shall be $10.00, the monthly fee for a soft drink stand shall be $35.00, the daily fee for a coffee stand shall be $5.00, the monthly fee shall be $35.00.

Section 1. It shall be unlawful to conduct any ice cream parlor or stand, or any soft drink parlor or stand, where any malt, vinous, mixed or fermented drink is sold, or any coffee house or stand without first obtaining the license provided for in this ordinance.

Section 2. Any person, firm or corporation desiring to conduct such a place shall file with the Village clerk his application setting forth the proposed location, the name of his applicant, or owners of the firm or name of corporation and the President thereof and the kind of business proposed and shall accompany the same with the license fee provided herein. If it shall appear that the applicant has complied with the terms of this ordinance the President of the Board of Trustees shall issue a license.

Section 3. Such license, except as hereinafter provided, shall be for a term ending the following day, providing that an annual license issued for either January and before May first, shall be one of half of the annual fee.

Section 4. A stand or herein used shall be taken to be any ice cream place, soda or ice cream parlor, or place where mixed or vinous drinks are sold.

Section 5. The fee for ice cream parlor shall be $50.00 per annum for the fountain or counter and $2.00 per annum additional for each table whereon ice cream is served, the fee for an ice cream stand shall be $20.00, the fee for a soft drink parlor or stand where malt, vinous, mixed or fermented drinks are sold shall be $125.00, the fee for a coffee house or stand shall be $35.00, the fees mentioned in this section are the annual fees.

Section 6. In lieu of the above fees, the licensee may at his option in the case of a stand pay a daily or monthly fee proratable said fee shall be paid in advance of the day or month in question. The daily fee for an ice cream stand shall be $10.00, the monthly fee for an ice cream stand shall be $50.00, the daily fee for a soft drink stand shall be $10.00, the monthly fee for a soft drink stand shall be $25.00, the daily fee for a coffee stand shall be $5.00, the monthly fee shall be $20.00.

Section 7. In none of the above places shall any piano or other instrumental music be played on Sunday or after ten o'clock P.M. or before seven o'clock A.M.

Section 8. Nothing in this ordinance shall be construed to permit the sale or any drink or concoction forbidden by the laws of the State of Illinois, or the United States, or the ordinance of the Village of Lake Zurich.

Section 9. Nothing in this ordinance shall be construed to require any hotel, or restaurant furnishing ice cream, coffee or drinks with meals to take out any license therefor, nor shall any church, lodge or society holding any entertainment or picnic be required to take out any license on account of the sale of any ice cream or drinks or coffee at the place where such entertainment or pirnic is held on that occasion.

Section 10. Any person, firm or corporation violating this ordinance shall be fined not less than Twenty-five dollars, and not more than Two hundred Dollars, and each day that said business is conducted without a license shall be considered a separate offence.

Section 11. No more than one license shall be required for any of the above businesses or combinations thereof conducted at the same place, but the fee to be paid by the licensee shall be the license required under this ordinance to be paid upon that article sold by him, where upon the highest license under this ordinance is charged.

Section 12. Any annual license applied for during the year 1921 shall require 75% of the full annual fee.

Section 13. This ordinance shall take effect from and after its passage and posting.

Plaintiffs in error are residents of said Village of Lake Zurich and are engaged in said Village in conducting a notion store, news stand, soda fountain and selling candies, ice cream, cigars, drugs and tobacco. There is little or no dispute as to the facts in this case. The Plaintiff in error, Frederick Deschauer, testified as follows; I live in Lake Zurich, Illinois. Am engaged in a general notions store and

Section 7. In none of the store places shall any piano or other instrument music be played on Sunday or after one o'clock P.M. on Saturday during Lent.

Section 8. Nothing in this ordinance shall be construed to repeal the sale of any drink in compliance therewith in the case of the State of Illinois, or the United States, or the ordinance of the Village of Park Ridge.

Section 9. Nothing in this ordinance shall be construed to require any hotel, or restaurant furnishing the same, duly in force with power to take out any license therefor, nor shall any church, lodge or society holding any entertainment or picnic be required to take out any license on account of the sale of any ice cream or drinks or coffee at the place where such entertainment or picnic is held or such occasion.

Section 10. Any person, firm or corporation violating this ordinance shall be fined not less than Twenty-five Dollars, nor not more than Ten Hundred Dollars, and each day that such business is conducted without a license shall be considered a separate offense.

Section 11. In case the license shall be revoked for one of the store premises or wholesale liquor dealers mentioned in the first place, but the fee be in not of the license paid in the license required under this ordinance be in any way over which said fee, every year the Village license under this ordinance is issued.

Section 12. Our annual license money for the year 1911 shall require 75% of the full annual fee.

Section 13. This ordinance shall take effect from and after its passage and posting.

Plaintiffs in error are residents of Park Village of Cook County and are engaged in said Village in conducting a motion picture, moving stage, note foundrik and selling candies, ice cream, liquor, cigars and tobacco. There is little or no dispute as to the facts in this case. The Plaintiff in error, Frederick Bessinger, testified as follows: I live in Cook County, Illinois. He engaged in a profitable business and

conduct a soda fountain and likewise sell ice cream; have been in our place of business two years the 7th day of this last July; My brother and I, defendants in this action, own the place. In the winter we close up about the first of October where we have a few chairs and tables. We handle cigars, tobacco, drugs, sell newspapers, stationery, school supplies and a few other odds and ends such as novelties which we handle during the summer months and with a soda fountain and ice cream. We do not sell ice cream during the winter months but conduct our business right along, outside of ice cream, during the year round.

It is urged that the ordinance is illegal and invalid for the reason the fee provided is excessive, and that the license should not be issued by the President of the Village.

It is also the contention of the plaintiffs in error that they should not be required to comply with the ordinance relied upon by the defendant in error, because they are honorably discharged soldiers of the World War. They rely upon sections 673 and 674 of chapter 24, Smith's Illinois Revised Statutes 1921, which read as follows:

> Section 673: On and after the passage of this act, all former soldiers and sailors of the United States, or of the State of Illinois, honorably discharged from the military, naval or marine service of the United States, or of the State of Illinois, including former soldiers and sailors of the World War, shall be permitted to vend, hawk and peddle goods, wares, fruits or merchandise, not prohibited by law, in any county, town, village, incorporated city or municipality, within this state without a license: Provided, said soldier or sailor is engaged in the vending, hawking, or peddling of said goods, wares, fruits or merchandise, for himself only.
>
> Section 674. Upon the presentation of his certificate of discharge to the clerk of any county, town, village, incorporated city or municipality in this State, and showing proofs of his identity as the person named in his certificate of honorable discharge, the clerk shall issue to such former soldier or sailor of the United

conduct a soda fountain and likewise soft ice cream; been in our place of business two years the 7th day of this last July. My brother and I, interested in this action, own the place. In the winter we close on about the first of October when we have a few chairs and tables. We begin about, January, every, year, selling, confectionery, soft drinks and a few other odds and ends such as novelties which we handle during the summer months and with a soda fountain and ice cream. We do not sell ice cream during the winter months but confine our business right along, outside of ice cream, during the year round.

It is agreed that the evidence in chief may be treated for the reason the matter is necessary, as that the injunction should not be issued by the President of the Village.

It is also the contention of the plaintiffs in error that they should not be required to comply with the ordinance relied upon by the defendant in error, because they are honorably discharged soldiers of the World War. They rely upon sections 678 and 679 of chapter 24, Smith's Illinois Revised Statutes 1929, which read as follows:

Section 678: On and after the passage of this act, all former soldiers and sailors of the United States, or of the State of Illinois, honorably discharged from the military, naval or marine service of the United States, or of the State of Illinois, including former soldiers and sailors of the "Civil War", shall be permitted to vend, hawk and peddle goods, wares, fruits or merchandise, not prohibited by law, in any county, town, village, incorporated city or municipality, within this state without a license: Provided, said soldier or sailor is engaged in the vending, hawking, or peddling of said goods, wares, fruits or merchandise, for himself only.

Section 679. Upon the presentation of his certificate of discharge to the clerk of any county, town, village, incorporated city or municipality in this State, and showing proof of his identity, to the person named in his certificate of honorable discharge, the clerk shall issue to such former soldier or sailor of the United

States or of the State of Illinois, a license, but such license shall be free, and said clerk shall not collect or demand for the county, town, village, incorporated city or municipality, any fee therefor. Any clerk of any county, town, village, incorporated city or municipality in this State, who shall violate any of the foregoing provisions of this Act, by failing or refusing to comply with such provisions as herein directed, shall be fined in a sum not less than ten($10.00) dollars nor more than fifty ($50.00) dollars, to which may be added imprisonment in the county jail, not exceeding ten days.

Section 65 of Chapter 24, Revised Statutes, provides that the City Council in cities and the President and Board of Trustees in villages, among other things shall have the following powers:

Paragraph 91. To tax, license and regulate auctioneers, distillers, breweries, lumber yards, livery stables, public scales, ice cream parlors, coffee houses, detective agencies, private detectives, money changers and brokers.

It will be observed that the defendant in error, was by reason of said paragraph 91, expressly authorized to pass the ordinance in question.

Villages have power to tax ice cream parlors without regulating them. Howland vs. City of Chicago, 108 Ill. 496; Carrollton vs. Mazzette, 159 Ill. 284; Ferry Co. vs. East St. Louis, 102 Ill. 560.

The legislature may authorize a license fee to be imposed and the fee for such license collected with a view to revenue only. Harder's Storage Co. vs. Chicago, 235 Ill. 58.

Strictly speaking the Village is not by its ordinance taxing one who merely sells ice cream, but it is under the provisions of the statute, taxing an ice cream parlor. It requires a clear and strong case to justify a court in annuling the action of a municipal corporation acting within the apparent scope of its authority. Hawes vs. City of Chicago, 158 Ill. 653.

An ordinance passed in the exercise of an express grant of power by the legislature is presumed to be valid, and it is incumbent upon a party attacking the ordinance as unreasonable to show affirmatively and clearly that it is so. The People ex rel Keller vs. The Village of Oak Park, 266 Ill. 365.

Where two constructions are possible, one which will sustain the ordinance and the other which will defeat it, the court will adopt the construction sustaining the ordinance. City of Benton vs. Blake, 263 Ill. 358. Chicago vs. Washingtonian House, 289 Ill. 206-213.

No propisitions of law were submitted to the trial court. In view of the state of the record we are of the opinion the only matters open for review are whether or not the court ruled correctly on admission and exclusion of testimony and the sufficiency of the evidence to support the finding. Bione vs. Bell, 221 Ill. App. 434-436; Basencon vs. Walters, 203 Ill. App. 28; Miller vs. Maybeyry, 203 Ill. App. 58.

Where the trial is before the court without a jury, questions of law can only be raised and urged by complying with section 61 of the Practice Act.

Where no propositions of law or fact are held by the trial court in a non-jury case, the Appellate Court is not informed on what grounds the trial court based its judgment and all rulings of the court on questions of law are presumed to be correct. J. Spencer Turner Company vs. Schwill, 195 Ill. App. 432; Fellows vs. Johnson, 183 Ill. App. 42; Knox Engineering Co. vs. Railway Company, 181 Ill. App. 350.

The findings of a trial court in a non-jury case have the same weight and effect as the verdict of a jury, and a court of review would not be warranted in setting aside such finding unless it is manifestly against the weight of the evidence. Ellsworth vs. Butler, 170 Ill. App. 66; Cutman vs. Eichner, 167 Ill. App. 313; Mason vs. Krag, 191 Ill. App. 1; Hooper vs. Kaskaskia Live Stock Insurance Company, 201 Ill. App. 167. We are not prepared to say that the finding is manifestly against the weight of the testimony.

Plaintiffs in error insist that the ordinance relied upon by defendant in error, is unreasonable. If they desired that question passed

An ordinance passed in the exercise of an express grant of power by the legislature is presumed to be valid, and it is incumbent upon a party attacking the ordinance as unreasonable to show affirmatively and clearly that it is so. The People ex rel Keller vs. The Village of Park Ridge, 321 Ill. 164.

When the constitutionality of statutes, or of their application in contention and the other Bill of Rights issues, the court will always use construction sustaining the ordinance. City of Benton vs. Blake, 285 Ill. 184. Illinois vs. Illinois Steel Co., 264 Ill. 1; Illinois vs. Illinois Steel Co., 264 Ill. 1.

No propositions of law were submitted to the trial court. In view of the state of the record as to the opinion the only matters open for review are whether or not the court ruled correctly on admission and exclusion of testimony and the sufficiency of the evidence to support the finding. Cohen vs. Hill, 5 Ill. App. 2d 1; Hartman vs. Hilliard, 208 Ill. App. 38; Miller vs. Dugdonny, 247 Ill. App. 38.

Where the trial is before the court without a jury, questions of law can only be raised and urged by conferring with decision of or the trial court.

Where no propositions of law or fact are held by the trial court in a non-jury case, the Appellate Court is not influenced on what grounds the trial court based its judgment and all rulings of the court on questions of law are presumed to be correct. C. Wendel Tanner Company vs. Schmidt, 11 Ill. App. 2d; Pelland vs. [illegible], 197 Ill. App. 4; [illegible] vs. [illegible], [illegible] Ill. App.

The findings of a trial court in a non-jury case have the same weight and effect as the verdict of a jury, and a court of review would not be warranted in setting aside such finding unless it is manifestly against the weight of the evidence. Hillmann vs. Walker, 170 Ill. App. 55; Graham vs. Kimmer, 167 Ill. App. 38; Brown vs. Cree, 141 Ill. App. 1; Hooper vs. Kankakee Live Stock Commission Company, 201 Ill. App. 187. We are not prepared to say that the finding is manifestly against the weight of the testimony.

Plaintiffs in error insist that the appellee relied upon by defendant in error, is unreasonable. If they desired that question raised

upon they should have complied with section 118 of the Practice Act, and submitted the case to the Supreme Court. This court is without authority to determine the question raised on the ordinance.

It is next insisted by the plaintiffs in error that the court erred in denying them the benefit of the statute exempting honorably discharged soldiers of the World War from paying a license tax. The evidence shows that the plaintiffs in error are partners and engaged in a permanent business in an ordinary store building, running in connection with that business an ice cream parlor during a certain season of the year. The act relied upon by plaintiffs in error, was adopted in 1901, and applied to ex-union soldiers and sailors, honorably discharged from the military or marine service of the United States. The act was amended in 1921, so as to include all soldiers of all wars. The question presented involves the construction of the two sections of the statute relating to vending, hawking and peddling by honorably discharged soldiers. It was the intention of the law making body to permit those who had done military service for their Country, or State, to hawk and peddle without being required to pay a license for so doing. The legislature evidently did not have in mind to extend the exemption to those engaged in a permanent business, at a definite and fixed location. The language of the statute indicates that this legislation was for the purpose of exempting the soldier or sailor that was an itinerant hawker or peddler. We are not unmindful that the word "vend" appears in the statute. It is in our judgment to be construed in connection with the words with which it is associated. The language of the statute is vend, hawk and peddle. According to the dictionaries, "vend" means to sell, to offer for sale. "Hawk' to cry or carry about for sale. "Peddle" to travel about selling small wares. In accordance with the maxim, <u>noscitur a sociis</u>, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears.

37 Cyc. paragraph 1118g.

The ordinance being in evidence, and a violation thereof established, this being a non-jury case and no propositions of law having been submitted, all rulings of the court on questi ons of law involved in the case are presumed to be correct.

We conclude, therefore, that the judgment of the circuit court of Lake County should be affirmed which is accordingly done.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of Nov. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

5

Rehearing Denied
Oct 1, 1924

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 4 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

John P. Bargren,
appellee,
vs.
Lizzie M. Shaw, executrix of the last will and testament of Edwin Robinson, deceased,
appellant.

Appeal from the Circuit Court of Winnebago County.

Jett, P.J.

This proceeding was instituted by John P. Bargren, appellee, by filing a claim against the estate of Edwin Robinson, deceased, in the County Court of Winnebago County, for labor and services in taking care of horses, repairing fences, for furnishing groceries to the deceased in his lifetime, and for other items mentioned on the claim aggregating $2013.90. The claim was disallowed in the County Court and claimant prosecuted an appeal to the Circuit Court of Winnebago County. A trial was had in the Circuit Court and the jury found for the claimant (appellee here) in the sum of $600. Judgment was rendered on the verdict of the jury and appellant prosecutes this appeal.

It is urged that there was no express contract, and that the evidence in the case fails to show a promise to pay and does not sustain the allowance of the claim. The evidence discloses that Mr. Robinson, the deceased, was an elderly man, about 80 years of age, feeble and unable to do but little if any manual labor; he lived alone and had no one to care for him; that he pastured for hire, many horses brought to his premises by the owners thereof, and had considerable work done on his farm.

The evidence further shows that appellee was in the employ of the City of Rockford; that after working for eight hours for the city he would go to the farm and work for Robinson almost daily, including Sundays; that he took care of the stock, fixed the fences and performed other labor about the place which was of value to the deceased; that the claimant on Sunday frequently took baskets of food to the deceased.

Appeal from the Circuit Court
of Hinsdale County.

Affirmed.

This proceeding was instituted by John C. Wagner, appellee, by filing a claim against the estate of Edwin Robinson, deceased, in the county court of Hinsdale County, for labor and services in taking care of horses, repairing fences, for furnishing groceries to the deceased in his lifetime, and for cash loans furnished on the claim aggregating $2012.00. The claim was disallowed in the county court and allowance procured on appeal to the circuit court of Hinsdale County. A trial was had in the circuit court and the jury found for the claimant (appellee here) in the sum of $800. Judgment was rendered on the verdict of the jury and appellant prosecutes this appeal.

It is urged that there was no express contract, and that the evidence in the case fails to show a promise to pay, and does not sustain the allowance of the claim. The evidence discloses that Mr. Robinson, the deceased, was an elderly man, about 80 years of age, feeble and unable to do but little if any manual labor; he lived alone and had no one to care for him; that he produced for hire, many horses varously in his pasture in the summer time; and he occasionally were some on his farm.

The evidence further shows that appellee ran in the employ of the city of Rockford; that after working six eight hours for the city he would go to the farm and work for Robinson almost daily, including Sundays; that he took care of the house, fixed the fences and performed other labor about the farm (also was of value to the deceased; that the claimant on Sunday frequently took dinner at dinner at the deceased.

A number of witnesses most of whom were farmers, living in the vicinity in which the deceased resided testified relative to the work done and services performed by appellee for the deceased and as to the value thereof. No testimony was offered by appellant controverting the evidence offered on the part of the claimant. Implied contracts are proved by evidence from which it is implied that the parties made an agreement under the circumstances and conditions disclosed. Mowatt vs. City of Chicago, 292 Ill. 578. The question as to whether the evidence sustains the claim was one of fact for the jury and we are not prepared to say that the jury was not justified under the evidence in finding for the claimant in the sum of $600. Furthermore neither the trial judge nor the Appellate Court should disturb a verdict of the jury merely because, if the question of fact had, in the first instance, been submitted to the court instead of to the jury, the court would have come to a different conclusion than that reached by the jury. To authorize the interference of the court in this respect, the evidence must preponderate against the verdict. Gilbert vs. Moore, 79 Ill. 341-345.

It is insisted by appellant that the court erred in giving the 2nd, 4th, 5th, 6th, 7th, 8th and 9th instructions given on behalf of appellee and in refusing appellant's instruction number one.

We have carefully examined the suggestions made by appellant relative to the instructions complained of and given on the part of the claimant. All of the instructions given should be considered and read together as a whole. The court of last resort has repeatedly held that the instructions in a given case should be considered as a series and applying the rule we are unable to see any good reason for saying that the jury was not fully and fairly instructed in the case. We are of the opinion no reversible error was committed in the giving of instructions.

The instruction appellant complains of, that was refused by the court, is as follows; "The court instructs the jury that long delay

in presenting or prosecuting a claim creates a strong presumption against its validity, and particularly is this so if the jury find from the evidence that it was not asserted in the lifetime of the alleged debtor." Under the facts in this case it would have been highly improper for the court to have given this instruction. The claim was presented by the claimant within the time allowed by the statute for presenting such claims. There is nothing in the record to show long delay in filing the claim or of claimants not asserting the same during the lifetime of the deceased.

We are clearly of the opinion the court did not err in refusing the instruction. It is insisted that the court erred in permitting the claimant to testify as a witness in the case. His testimony was limited entirely to matters and things that transpired since the death of the decedent. On the whole it seems to us that no reversible error has intervened in the trial of this cause. The judgment of the circuit court of Winnebago county is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 5th day of Nov. in the year of our Lord one thousand nine hundred and twenty four,

Justus L. Johnson
Clerk of the Appellate Court.

4016 h

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

May Homrighouse, Administratrix of the Estate of John Phillip Homrighouse, deceased,

Appellee.

vs.

H. V. Bale,

Appellant.

Appeal from the Circuit Court of Peoria County.

Jett, P. J.

Appellee recovered a judgment for $8166.00 for the alleged wrongful death of her husband who sustained injuries from which he subsequently died when the automobile truck which he was driving struck or was struck by the car of the appellant. From this judgment appellant brings the case to this court on appeal and insists first that the lower court erred in the admission of evidence; second that erroneous instructions were given on behalf of appellee; third that proper instructions were refused on behalf of appellant; fourth that counsel for appellee made an improper and prejudicial argument to the jury and finally that the verdict is manifestly against the weight of the evidence and that the damages are excessive.

It appears from the evidence that appellee's intestate was a carpenter, forty-four years of age at the time of his death, able-bodied, in good health, industrious and earned between $6.00 and $7.00 per day at his trade. On December 11, 1921, about nine o'clock in the evening appellee's intestate accompanied by his wife, was driving his truck toward Henry, on Western Avenue going East toward the hard road leading from Peoria to Springfield. Appellant, a resident of Springfield, Illinois, accompanied by his wife, a Mrs. Larson and a Miss Ingles was driving his car, a Marmon, in a southerly direction on the hard road toward Springfield. The collision occurred at the intersection of said Western Avenue and the hard road.

Appellant insists that when he approached the intersection one hundred or two hundred feet away he was driving between twenty-five and

thirty miles per hour and when he saw the headlights of the truck of deceased he threw out his clutch and slowed down. That deceased drove his car to the edge of the pavement and stopped. That both the Marmon and the truck started forward, deceased going east across the hard road and appellant south at the rate of fifteen miles per hour toward the intersection and when appellant was within fifteen feet of the truck of deceased it stopped for an instant upon the pavement and thereupon appellant, in order to avoid a collision swung his car abruptly to the left and into a ditch but deceased had started his truck and it struck appellant's car back of the right front wheel the effect of which was to turn the truck to the south and after travelling fifty feet to the south on the pavement it turned over in the ditch. It is the theory of appellee that deceased having the right of way, approached the crossing going fifteen miles per hour and without stopping proceeded across the hard road and that while on the pavement the car of the appellant came rapidly toward the intersection and struck the truck of the deceased back of its left front wheel causing the rear end of the truck to be thrown against the side of appellant's car as it turned sharply to the left. As the case is to be remanded for another trial for the errors hereinafter indicated we shall not discuss at length either the weight or the sufficiency of the evidence except to state that it is conflicting and of such nature and character as to require that the record, before a judgment in appellee's favor can be affirmed, must be substantially free from error.

The trial court properly permitted certain witnesses to testify whether or not there was much or little travel on Western Avenue and it was not error to permit the answer of appellee to stand that the speed of appellant's car seemed "very fast." Overton vs C. & E. I. R.R. Co. 181 Ill 323; U.C. R.R. vs Ashline 171 Ill. 313. The testimony of the witness Hopler that he heard appellant say a day or two after the collision that "this is what I get for speeding", referring to the injuries of deceased, was properly admitted as it was in the nature of an admission but the testimony of the witness Wendt, that he overheard appellant say that he hoped the deceased would get well and that if there were any damages he would settle, was incompetent as it did not tend to prove any issue in the case. Shaw vs Corrington, 171 Ill. App. 232. And when it appeared

from the evidence that the witness Mundt did not see the collision his testimony that the car of appellant "hit" the front wheel should have been excluded as should also the conclusion of the witness Mendt that the marks he saw on the pavement "looked like Ford marks" and that "they looked like they were just done that night-when I come in from out there the next morning after I had looked at them."

It is next insisted by appellant that the court erred in giving on behalf of appellee and its refusal to give at the request of appellant certain instructions to the jury. The first instruction told the jury that no person should drive a motor vehicle, such as was driven by the defendant upon any public highway in this State at a greater speed than was reasonable and proper having regard for the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. This instruction is substantially in the language of the statute and regardless of any criticism that might be made of the instruction, appellant is in no position to urge that it is erroneous because of the third given instruction on his part, which is substantially to the same effect.

The third instruction given on behalf of appellee told the jury that a person approaching the intersection of two highways shall grant the right of way to a vehicle approaching said crossing at the same time upon the right side, means that at such crossing the driver of one vehicle has an affirmative duty to keep out of the way of the vehicle approaching said crossing upon his right side. The instruction then continued, "This requires him to slow, to stop and if need be, to reverse, if otherwise the crossing vehicles are likely to come into contact; and such rule is a rule of law of the State of Illinois where two elements appear, viz: full view of the vehicle approaching from the right, and failure to take any steps to keep out of its path. This is statute law of the State of Illinois and its violation is negligence." This instruction peremptorily directed the jury to find appellant negligent and it did not take into consideration any of the actions of the deceased in approaching or crossing the intersection where the collision occurred, nor did this instruction require of deceased the exercise of any diligence or due care on his part but told the jury that it was the affirmative duty of appellant to dee out of the way of

deceased's truck. Another vice of this instruction in our opinion is the fact that it assumes that appellant failed to take any steps to keep out of the path of the approaching truck and it states positively that the violation of this law is negligence. The failure to comply with statutory requirements with reference to matters of this character would in law be prima facie evidence of negligence but not negligence per se. Johnson vs Pendergast, 308 Ill. 255.

It is seriously urged that the trial court erred in refusing a number of instructions tendered by appellant but we beleive that all that was proper in them was covered by some of the given instructions and that no reversible error was committed by the lower court in refusing any of the refused instructions.

It is next insisted that prejudicial remarks were made by the attorneys for appellee in their argument to the jury. The record shows that the court sustained several objections to counsel's argument much of which was unfair and prejudicial. For instance one of the attorneys for appellee in calling the jury's attention to the condition of the Ford truck stated that the pictures had been taken of everything which was of advantage to appellant and that if the condition of the truck was not just as one of appellee's witnesses had testified, appellant could have taken a picture of it and could have introduced such pictures in evidence stating that he (counsel) thought "they did have pictures taken of it but did not introduce them." Another one of appellee's attorneys in his argument stated that as a result of appellant's speeding the blood of a fellow human being was on his hands. Counsel then contrasted the position of appellee and appellant stating that appellee had been deprived of her help-mate; that she was sitting lonesome and alone in her little cottage on the river front looking the cold world in the face with nothing between her and the world, while appellant, sitting in a crowded courtroom, surrounded by lawyers and particular friends, who come to testify for him in order to keep him from doing what the law says he should do; that appellant had speeded times without number running fifty or fifty-five miles per hour and that if members of the jury knew that kind of a man was on the road they would not permit their wives and babies to be where he was likely to be. An objection

to this argument was made but was overruled and an exception preserved.

Counsel then proceeded to tell the jury that he had a wife at home blinded in one eye because some one had driven a car fifty mile per hour. An objection to this statement was sustained but to the next statement of counsel characterizing appellant as a "speed hound" the court refused to sustain the objection made.

None of this can be said to be legitimate argument and not only this court but the Supreme Court of this State has frequently had occasion to reverse judgments where verdicts were obtained by unfair argument. A verdict secured by such means will not be permitted to stand. Mattice vs Klawans, 312 Ill. 299. The motion of appellee to tax the costs of the additional abstract is denied in as much as the judgment is reversed.

For the foregoing reasons the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of nov, in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

4016c

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 628

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Stella B. Shepley,
Appellant.
vs.
County of Woodford,
Appellee.

Appeal from the
Circuit Court of
Woodford County.

Jett, P. J.

This is a suit in assumpsit brought by Stella B. Shepley in the Circuit Court of Woodford County against the County of Woodford, appellee, to recover for services as probation officer for the period from January I, 1920, to November 22, 1922 and her necessary expenses and disbursements in the handling and caring for the juvenile cases of said county during such period. The claim of said appellant for services at $100.00 per month is $3450.00 and her disbursements are $894.23.

The declaration consists of four special counts and was demurred to by appellee. The demurrer was general and special. The trial court held that each of the counts failed to state a cause of action. Appellant elected to stand by her declaration and prosecutes this appeal. The only question before the court is, does the declaration or either count thereof state a cause of action.

In view of the fact that the question for consideration arises upon the pleadings it will be necessary to set out the material averments of the declaration. The first count charges that the defendant did on and prior to, to wit, October Ist, 1917, appoint and maintain a Probation Officer in pursuance of the law authorizing it to do so, and maintain a Probation Officer for a long time prior to September 30th, 1917, to wit, since June, 1911, during all of which time the defendant maintained and provided a fixed compensation for its Probation Officer; that said compensation of such Probation Officer was fixed through the

Statia R. Shepley,
Appellee,
v. No.
County of Woodford,
Appellee.

Jett, P. J.

This is a suit in assumpsit brought by Statia R. Shepley in the Circuit Court of Woodford County against the County of Woodford, appellee, to recover for services as probation officer for the period from January 1, 1920, to November 28, 1922 and for necessary expenses and disbursements in the handling and caring for the juvenile cases of said county during that period. The claim of said appellant for services is $100.00 per month, in $2800.00 and her disbursements are $804.32.

The declaration consists of four special counts and one demurred to by appellee. The demurrer was sustained and overruled. The trial court held that each of the counts failed to state a cause of action. Appellant elected to stand by her declaration and prosecutes this appeal. The only question before the court is, does the declaration or either count thereof state a cause of action.

In view of the fact that the question for consideration arises upon the pleadings it will be necessary to set out the material averments of the declaration. The first count alleges that the defendant did on and prior to, to wit, October 1st, 1917, appoint and maintain a Probation Officer in pursuance of the law authorizing it to do so, and maintain a Probation Officer for a long time prior to September 30th, 1917, to wit, since June, 1911, during all of which time the defendant authorized and provided a fixed compensation for its Probation Officer; that said compensation of such Probation Officer was fixed through the

action of the Board of Supervisors of defendant at one hundred ($100.00) dollars per month and necessary expenses and disbursements of said Probation Officer in the performance of the duties and functions of said office, and did during all of said time pay said compensation so fixed to its Probation Officer, and, whereas, the defendant was desirous of obtaining a suitable person as its Probation Officer and the plaintiff was a suitable person to perform the duties of such office and was experienced in the performance of the work and duties of the character necessary to perform as such Probation Officer. The defendant did on, to wit, September 24th, 1917, through its County Judge, designate and appoint plaintiff as Probation Officer of defendant, her services and term of office to begin October I, 1917, and to continue during the pleasure of the said County Court of the defendant. The said designation and appointment appears by order of said County Court entered September 24th, 1917, in words and figures following:

"It appearing to the Court that a vacancy will exist in the office of Probation Officer in the Juvenile Court on September 30th, 1917, Mrs. Stella B. Shepley is hereby appointed Probation Officer of the Juvenile Court of Woodford County, said appointment to take effect and be effective from the first day of October, A.D. 1917, until the further order of this Court."

Plaintiff then and there accepted said designation and appointment as Probation Officer of the defendant and then and there agreed to perform said services as directed by said County Court, and the Judge thereof, and as provided by law, for the compensation theretofore fixed for such office by the defendant through its Board of Supervisors as by law provided, said compensation so fixed being $100.00 per month and the necessary expenses and disbursements of said office, and plaintiff did on October Ist, 1917, begin the performance of the duties of said probation office of defendant, and that thereafter she did perform such duties and do the work of such office and incident thereto, under the direction of said County Court of the defendant and the County Judge thereof, during all of the time from said October Ist, 1917, down to November

ation of the Board of Supervisors of defendant at the hundred ($100.00) dollars per month and necessary expenses for disbursements of said Probation Officer in the performance of the duties and functions of said office, and did during all of said time pay said compensation as fixed to the Probation Officer, and, thereby, the defendant was desirous of obtaining a suitable person as the Probation Officer and the plaintiff was a suitable person to perform the duties of such office and was experienced in the performance of the work and duties of the character necessary to perform as such Probation Officer. The defendant did on, to wit, September 18th, 1917, through the County Judge, designate and appoint plaintiff as Probation Officer of defendant, her service did begin of office to begin October 1, 1917, and to continue during the pleasure of the said County Court of the defendant. The said designation and appointment appears by order of said County Court entered September 18th, 1917, in minute and finance Order Book:

"It appearing to the Court that a two-year, full-time Probation Officer for the Juvenile Court of Fredland County, said appointment to take effect and be effective from the first day of October, A.D. 1917, until the further order of this Court."

Plaintiff then and there accepted such designation and appointment as Probation Officer of the defendant and then and there agreed to perform said services as directed by said County Court, and the Judge thereof, and as provided by law, for the compensation therefore fixed for such office by the defendant through the Board of Supervisors, by law provided, said compensation of fifty dollars ($100.00) per month and the necessary expenses and disbursements of said office, and plaintiff did on October 1st, 1917, begin the performance of the duties of said Probation Office of defendant, and that thereafter the said performance and duties on the part of such office and incumbent thereto, under the jurisdiction of said County Court of the defendant and the County Judge thereof, during all of the time from said October 1st, 1917, even to December

22nd, 1922, and that during all of said time she did pay out and expend her own money for necessary expenses and disbursements of said office, and that all of said expenses and disbursements were under the direction of said County Court or the Judge thereof and were necessary in the performance of the work and duties of said office; that the defendant, through its County Court, at no time directed or requested the discontinuance of the services of plaintiff as such Probation Officer, but, on the contrary, the said County Court and the Judge thereof directed the plaintiff to continue in the performance of said services and at all times ratified and approved the services so performed.

On and after October Ist, 1917, down to January Ist, 1920, the defendant paid to plaintiff the compensation provided for such office as aforesaid, to wit, the sum of one hundred ($100.00) dollars per month and the necessary expenses and disbursements of such office said compensation was paid to plaintiff by the defendant, drawn on the County Treasurer of defendant, payable to plaintiff, on which warrants said compensation was paid to plaintiff. From and after January Ist, 1920, down to November 22nd, 1922, the defendant refused to pay the compensation so due her as aforesaid, and the same is still due and owing to the plaintiff. Each and every month after January I, 1920, down to, to wit, November 22nd, 1922, the defendant through its County Clerk, issued a warrant payable to plaintiff drawn on its County Treasurer in the sum of $1.00 each, said warrants being issued in the same manner and being of the same general character as the warrants issued to plaintiff for her compensation during the period from October Ist, 1920, except as to amount, and said warrants in the sum of $1.00 each were tendered to plaintiff as payment in full for her compensation for the respective months for which said warrants were issued; but plaintiff refused to accept each and every one of said warrants so written in the sum of $1.00 each. Wherefore, plaintiff says that there is due and owing to her from the defendant the sum of five thousand($5,000.00) dollars, and, therefore, she brings this, her suit.

In addition to the allegations contained in the first count, the second count alleges that during all of the period from October 1st, 1917, down to January 1st, 1920, defendant paid to plaintiff the compensation of one hundred ($100.00) dollars per month and expenses, theretofore fixed by the Board of Supervisors of defendant, and that such compensation was paid by the issuance of warrants monthly by the County Clerk of defendant, drawn on the County Treasurer of defendant, payable to plaintiff, and that at each and every session of the Board of Supervisors of defendant during which such time they approved and ratified and reaffirmed the compensation of one hundred dollars per month and necessary expenses. It also alleges that prior to the filing of the suit the County Judge of defendant did certify that the sum sued for, as particularly set forth in the bill of particulars attached to the declaration, was due and owing to the plaintiff, and that such certification was presented to the Treasurer of defendant and that he refused to pay, etc.

In addition to the averments contained in the first and second counts, the third count alleges that in December, 1919. the Board of Supervisors of defendant, without authority of law pretended to adopt a resolution to fix the salary and compensation of the defendant for servies as Probation Officer of the defendant at $1.00 per month to cover payment for her services and the moneys necessarily expended and disbursed by her in the performance of her duties as Probation Officer, and in pursuance of said pretended action of said Board of Supervisors, the defendant, through its County Clerk, on and after January I, 1920 issued warrants monthly to plaintiff, in the sum of $1.00 each, such warrants being drawn on the treasurer of the defendant in the same manner as the warrants issued to her for her compensation for the period preceding January I, 1920, and the defendant tendered said warrants in the sum of $1.00 each to the plaintiff for her compensation for her services, disbursements and expenses for the respective months for which said warrants were issued, but the plaintiff refused to accept said

warrants were issued, but the plaintiff refused to accept said warrants and each of them, and says that the pretended action of said Board of Supervisors in fixing her compensation at $1.00 per month is wholly void and of no effect, and that during all of the time covered by this action her compensation as Probation Officer remained and was as previously established by said Board of Supervisors $100.00 per month and necessary expenses and disbursements.

The fourth Count is similar to the first Count, except that it alleges that prior to the filing of the suit the County Judge of defendant did certify to the County Treasurer of defendant that there was due and owing the plaintiff from the defendant the sum of $3450.00 as salary and $894.23 as expenses and disbursements. The statute provides that in counties having a population of less than 500,000 the county judge of any such county shall have the authority to designate some suitable person to act as Probation Officer during the pleasure of the Court, and such Probation Officer shall be paid a suitable compensation for his services, such compensation to be fixed by the Board of County Commissioners or Board of Supervisors of such County, as the case may be, such compensation to be paid out of the County Treasury of such County monthly upon certification by the County Judge of such County. Chapter 23, Sec. 195, Smith-Hurd Rev. Statutes 1923, page 181.

Appellant it will be observed, as a basis for a recovery set up in her declaration that at the time of her appointment as Probation Officer, October I, 1917, and for a long time prior thereto, since June 1911, the defendant maintained a Probation Officer in pursuance of the law providing therefor, and that the defendant through its Board of Supervisors, fixed the compensation of such officer at $100.00 a month and necessary expenses and disbursements in the performance of the duties of that office, and that plaintiff was duly appointed by the order of the County Court, her appointment being effective as of October I, 1917, and "to continue until further

warrants were issued, but the plaintiff refused to pay, all defendants and each of them, and says that the prescribed action of and found of Supervisors in fixing her compensation at $3.00 per month in County vouchers and of no effect, and does hereby call on the Supervisors by this notice her compensation. Probation Officer mentioned and was as previously established by said Board of Supervisors $100.00 per month and necessary expenses and disbursements.

The [illegible] of the County, acting as [illegible] of defendants and certify to the County Treasurer of defendant that there has been owing the plaintiff from the defendants the sum of $3420.00 monthly and $894.53 expenses and disbursements. The statute provides that in counties having a population of less than 500,000 the county judge of such county shall have the authority to designate some and fixed salary to be an Probation Officer during the pleasure of the County, and such Probation Officer

[illegible]

[illegible] of Jackson County, in the case may be, may [illegible] County Judge of said County, [illegible] 1, 1947, [illegible] County Judge [illegible].

Upon this it will be observed, as a basis for a monetary [illegible] in her declaration that on the date of her appointment as Probation Officer, October 1, 1947, and for a long time prior thereto, [illegible] the salary provided therefor, and that the defendant [illegible] of the law providing therefor, and that the defendant through its Board of Supervisors, fixed the compensation of such [illegible] in the performance of the duties of that office, and that plaintiff has duly qualified by the order of the County Court, her qualifications being effective as of October 1, 1947, and the defendants would further

order of the Court"; that plaintiff accepted such appointment for the compensation theretofore fixed by the Board of Supervisors of defendant and assumed and performed the duties of such office under the direction and supervision of the County Court from that time down to and covering the period for which her compensation is here sought to be recovered, viz, November 22, 1922; that during all of such time down to January I, 1920, (two years and three months,) the defendant paid to her the compensation fixed as aforesaid, viz, $100.00 per month and expenses; that it was paid to her by warrants being drawn monthly by the County Clerk on the County Treasurer and payment made to her by the county Treasurer and the report thereof ratified and approved by the Board of Supervisors at its session next following such payment; that such payment ceased January I, 1920, and thereafter for the years 1920, 1921, and down to November 22, 1922, she continued as a probation officer, but that the defendant, through its county clerk and its county treasurer refused to pay her said compensation from and after January I, 1920, and that instead of giving to her the warrants on the county treasurer for each month's salary of $100.00 and expenses, as had been the practice theretofore for two years and three months, the defendant, through its county clerk, tendered to plaintiff each month after JanuaryI, 1920, a warrant for $1.00 same being tendered in full of her salary and expenses. She refused to accept this payment of $1.00 per month. That the warrants of $1.00 per month were tendered to plaintiff in conformity with a resolution passed by the Board of Supervisors in December 1919, which resolution provided that after January I, 1920, the compensation of plaintiff should be $1.00 per month same to cover all of the expenses of the office as well as her salary; that the county judge of defendant, prior to the filing of this suit, certified to the county treasurer of defendant that there was due and owing to the plaintiff from the defendant the sum of $3450.00 as salary from January I, 1920, to November 22, 1922 at $100.00 per month and that there was due her the further sum of $894.23 on account of necessary disbursements made by

her in the conduct of the probation office.

A probation officer is not a constitutional officer but is a county officer holding a position created by the legislature. The salary of such officer must be fixed by the Board of Supervisors. A probation officer suing for compensation assumes the burden of alleging and establishing that the provisions of the statute have been strictly complied with in the matter of appointment and of fixing compensation. It necessarily follows that no officer or agent of the county has any power to bind the county by any contract or agreement with any other officer of the county in relation to the compensation of such officer in an manner varying from the statute, and it also follows that the right of a probation officer to collect compensation cannot be based upon custom or estoppel. The Board of Supervisors can raise or lower the salary of a county officer who is not a constitutional officer at any time. Quernheim vs. Asselmeier, 296 Ill. 494. The resolution of the Board of Supervisors fixing the compensation of the probation officer at $1.00 per month was adopted in December 1919, and is the only action of the Board, as a Board, shown by this record, and if inadequate as a matter of law the question cannot be tested in this suit.

The services of the appellant for which she seeks to recover were rendered after the adoption of the resolution fixing the compensation at one dollar per month. It was not incumbent upon appellant to render the services and if she did perform them she did so knowing the contents of the December resolution. Since the Board of Supervisors had the right to raise or lower the compensation of appellant at any time, it is not for the court to say whether the action of the Board was ill-advised or otherwise. It is sufficient to say that the county board had the power to adopt the resolution and it is not the province of the court to question the action or the motive of the board in so doing, however unreasonable or unjust it may seem, in the absence of a showing that an actual right of appellant has been violated. Quernheim vs.

nor in the conduct of the probation office.

A probation officer is not a constitutional officer but is a county officer holding a position created by the legislature. The salary of such officer must be fixed by the board of supervisors. A probation officer also is subordinate to the judge of the court of criminal and establishing that the provisions of the statute have been strictly complied with in the matter of appointment and of filing commendation. It necessarily follows that no officer or agent of the county has any power to act in the county in any matter or agreement with any other officer of the county in relation to the commitment of such officer in an manner varying from the statute, and it also follows that the right of a probation officer to collect compensation rests on legal authority or authority. The fact of appointment or the order of [illegible] of a [illegible] officer can in no a constitutional effect of any law. [illegible] vs. Amelander, 6th Cal. 4th. The resolution of the board of Supervisors fixing the compensation of the probation officer as $1.00 per month was adopted in December 1898, and is the only action of the Board, as a Board, shown by this record, and if taken were as a matter of law the question cannot be tested in this suit.

The services of the appellant for which she seeks to recover were rendered after the adoption of the resolution fixing the compensation at one dollar per month. It was not incumbent upon appellant to render the services and if she did perform them she did so knowing the contents of the December resolution. Since the Board of Supervisors has the right to raise or lower the compensation of appellant at any time, it is not for the court to say whether the action of the Board was ill-advised or extravagant. It is sufficient to say that the county board had the express power to adopt the resolution and it is not the province of the court to question the action or the motive of the [illegible] in doing, however unreasonable or unjust it may seem, in the absence of a showing that an actual right of appellant has been violated. [illegible] v.

Asselmeier, Supra.

The statute does not provide for the payment of any of the expenses or disbursements of the probation officer. If the statute provided for the payment of expenses the amount should be fixed by the Board of Supervisors. The declaration does not aver that any amount was ever fixed. The averments in relation to the county judge approving the expenditures and the appellant collecting them up to January I, 1920, would not establish a right to like expenditures from January I, 1920 to November 22, 1922; nor would such a custom or practice establish a right to such expenditures without a prior fixing by the board of supervisors even if it were a case where the county was obligated by law to pay the expenses. The expenses of an officer should be fixed in advance by the county board and where not so fixed the officer cannot recover. Coles County vs. Messer 195 Ill. 540. The resoluation abbrogated prior actions of paying the salary and if the new salary was so inadequate as to be a nullity, the same condition existed as if the salary had been revoked and no salary fixed. A probation officer cannot ursurp the functions of the Board of Supervisors and fix the salary.

Appellant relies upon the case of Desota County vs. Westbrook, 64 Miss. 312; Whatever may be the ruling in other jurisdictions and as announced in the Mississippi case it cannot be controlling here. It appears that the jury in the Mississippi case was permitted to pass upon the question of the adequacy of the compensation. The statute as we have heretofore seen provides that the salary of the probation officer must be fixed by the Board of Supervisors. Such being the case no recovery can be had for what the services were reasonably worth and therefore the ruling as announced in the Mississippi case can have no probative force here.

It is insisted by the appellant that where a statute authorized a county to exercise certain powers in a particular manner and such powers are exercised in a different manner the county will be estopped from asserting such irregulartiy, if it has received the benefits of the subject matter of the contract. This rule cannot be invoked by appellant under the averments of the declar-

[illegible] Court.

The statute does not provide for the payment of any of the expenses or disbursements of the prosecution officer. If the expenses for the travel of witnesses his answer should be filed by the Board of Supervisors. The indictment does not aver that an account was ever filed. The answers in relation to the county judge appearing and representing and the sheriff appearing by [illegible] I, 1890, [illegible] a claim or bill against [illegible] from January 1, 1890 to November 24, 1892; nor would such a course of practice authorize a right to such expenditures without a prior filing by the board of supervisors even if it were a case where the county was obligated by law to pay the expenses. The expenses of an officer should be filed in advance by the county board and where not so filed the officer cannot recover. Coles County vs. Hansen 126 Ill. 590. The resolution acknowledgment matters of keeping the county and if the new county has no funds yet as to be a county, the same condition obtains as if the county had been revoked and no county filed. A prosecution officer cannot usurp the functions of the Board of Supervisors and pay the county.

Applicant relies upon the case of Pontiac County vs. Pontiac, 94 Ill. 112; whatever may be his making to other principles and as announced in the Mississippi case it cannot be controlling here. It appears that the jury in the Mississippi case was permitted to pass upon the question of the necessity of the expenditure. The courts do not have heretofore been provided that the salary of the prosecution officer must be filed by the Board of Supervisors. Such being the case or recovery can be had for when the services were reasonably worth and therefore the ruling as announced in the Illinois case can have no prohibitive force here.

It is implied by the condition that there is a distinction between a county to exercise corporate power in a corporate capacity and such county as created in a statutory manner the county will be exempt from statutory and implicitly. It is the creature the benefits of the subject matter of the contract. Like rule cannot be invoked by applying under the assessment of the decision

ation because she cannot recover what the services were reasonably worth but must recover, if at all, the compensation fixed by the Board of Supervisors. If the law ~~xxxxxx~~ providing for a probation officer fixed the compensation that such officer was to receive for the services rendered, then there would be some force in the contention of appellant.

We are of the opinion that the court committed no error in sustaining the demurrer to the declaration and the judgment of the ~~xxxxxx~~ Circuit Court of Woodford County is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

4012

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 629

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7264 Agenda No. 62

Synthia J. Case,

appellee,

vs.

Charles E. Weddell,

appellant,

Appeal from Circuit Court of De Kalb County.

235 I.A. 629

Jones, J.

This is the second time this case has been before this court, on appeal from the circuit court of De Kalb County. Cynthia J. Case, appellee, filed her suit against Charles E. Weddell, appellant to recover for losses alleged to have been sustained by her by the sale to her of certain shares of capital stock of the United Agency, a credit rating corporation, through fraud and deceit. She charged that the defendant, who was a Director of the United Agency, conspired with the other directors and officers of the corporation to misrepresent the true financial condition of the corporation to the public generally to enable the corporation to sell its stock at prices far above its actual value. She charged that they did make such false representations to her; that relying upon them she purchased 750 shares of the capital stock of the corporation paying therefor $16,394; and that she lost the entire purchase price.

Upon the first trial of the case, the court instructed the jury to find the defendant not guilty at the close of plaintiff's evidence. Judgment was rendered against the plaintiff for costs and in bar of the action. The plaintiff appealed to this court, where the judgment was reversed and the cause remanded to the circuit court of De Kalb county. The case was again tried at the February term, 1923 of that court and there was a verdict in favor of the plaintiff for $20,969.83. The court entered judgment on the verdict and the appellant brought the case to this court.

The opinion rendered by this court on the former appeal contains a full and complete statement of all of the facts in the case, as they

No. 7564 Docket No. 81

Cynthia J. Chase,

Appellee,

vs.

Appeal from Circuit Court

of De Kalb County.

Charles W. Vodehill,

Appellant.

Mr. Justice Dunn delivered the opinion of the court:

This is the second time this case has been before this court, on appeal from the circuit court of De Kalb County. Cynthia J. Chase, appellee, filed her suit against Charles W. Vodehill, appellant to recover for losses claimed to have been sustained by her by the sale to her of certain shares of capital stock of the United Agency, a credit rating corporation, through fraud and deceit. She charged that the defendant, who was a Director of the United Agency, conspired with the other directors and officers of the corporation to misrepresent the true financial condition of the corporation to the public generally to enable the corporation to sell its stock at prices far above its actual value. She charged that they did make such false representations to her; that relying upon them she purchased 750 shares of the capital stock of the corporation paying therefor $18,884; and that she lost the entire purchase price.

Upon the first trial of the case, the court instructed the jury to find the defendant not guilty at the close of plaintiff's evidence. Judgment was rendered against the plaintiff for costs and in favor of the action. The plaintiff appealed to this court, where the judgment was reversed and the cause remanded to the circuit court of De Kalb county. The case was again tried at the February term, 1922 of that court and there was a verdict in favor of the plaintiff for $20,909.88. The court entered judgment on the verdict and the appellant brought the case to this court.

The opinion rendered by this court on the former appeal contains a full and complete statement of all of the facts in the case, as they

appear from the evidence offered by the appellee. We held in that opinion that the evidence of the plaintiff fairly tended to support the averments of the declaration; that whether this evidence showed fraud and conspiracy was a question of fact for the jury, which should have been submitted to it.

It is urged that since the defendant has offere d his evidence there is a complete defense shown. We have carefully examined all of the evidence on the part of the defendant and the most that can be said is that it is in contradiction of the evidence offered by the appellee. It is said that the testimony of Charles V. Weddell, that he believed the representations to be true at the time they were made, shows that there was no liability on his part. But there is evidence on the part of the plaintiff fairly tending to show that he had actual knowledge that the representations were untrue. In such state of the evidence it is for the jury to determine the fact. The conflict in the evidence is such that if this case were before us purely upon the question of the sufficiency of the evidence to support a verdict, for the appellee, we would be compelled to affirm the judgment.

But complaint is made of a number of instructions given by the court at the instance of the appellee. The second instruction told the jury that fraud may be proved by circumstantial evidence as well as positive proof and stated; "It may be inferred from strong presumptive circumstances." This statement in the instruction was calculated to make the jury believe that fraud will be presumed in certain cases whereas fraud is never presumed without proof, but, "facts and circumstances may be proved from which the jury would have a right and be required to infer fraud," Bowden v. Bowden, 75 Ill. 143).

The third instruction directs a verdict. Because it does so, it must state accurately all of the facts necessary to be proven by the plaintiff to entitle her to a recovery. This it fails to do in

appear from the evidence offered by the appellee. We hold in that opinion that the evidence of the plaintiff fairly tended to support the averments of the declaration; that whether this evidence showed fraud and conspiracy was a question of fact for the jury, which should have been submitted to it.

It is urged that since the defendant has offered a his evidence there is a complete defense shown. We have carefully examined all of the evidence on the part of the defendant and the most that can be said is that it is in contradiction of the evidence offered by the appellee. It is said that the testimony of Charles V. Waddell, that he believed the representations to be true at the time they were made, shows that there was no liability on his part. But there is evidence on the part of the plaintiff fairly tending to show that he had actual knowledge that the representations were untrue. In such state of the evidence it is for the jury to determine the fact. The conflict in the evidence is such that if this case were before us purely upon the question of the sufficiency of the evidence to support a verdict, for the appellee, we would be compelled to affirm the judgment.

The complaint is made of a number of instructions given by the court at the instance of the appellee. The second instruction told the jury that fraud may be proved by circumstantial evidence as well as positive proof and stated; "It may be inferred from strong presumptive circumstances." This statement in the instruction was calculated to make the jury believe that fraud will be presumed in certain cases upon proof of some circumstances, etc., "facts and circumstances may be proved from which the jury would have a right and be required to infer fraud," Bowman v. Bowman, 78 Ill. 142).

The third instruction directs a verdict. Because it does so, it must state correctly all of the facts necessary to be proven by the plaintiff to entitle her to a recovery. This it fails to do in

several particulars. The most important are that it omits to tell the jury that the false representations must have been made to the plaintiff; that the plaintiff must have relied upon them in the purchase of the stock and that she suffered a lost as a result.

Instruction number five tells the jury "that every person entering into a conspiracy or common design already formed is deemed and considered in law a party to all acts done by any of the other parties, whether before or afterwards in the furtherance of the common design". The last sale of stock to the appellee was made on February 20th,1918. Yet, under the evidence the jury would be led to believe by this instruction that the appellant might become liable to the appellee for the sale of the stock because of acts done or representations made subsequent to February 20th, 1918, by any party to the conspiracy. It is evident that no representation of the conspirators subsequent to that date could be the basis of any liability to the appellee.

Instruction number 6 tells the jury that for the purpose of fixing liability upon a defendant they may consider the acts of the conspirators at any time between April 1913 and August 1919. As stated above, no liability to the appellee can be based on any act committed subsequent to February 20, 1918. All fraudulent representations must have been made before that time. We find no error in instructions number 7 and 8.

Instruction number 9 does not limit the liability of the appellant to the appellee to representations made to the appellee and might well have led the jury to believe that the appellant was liable to the appellee whether the appellee ever learned of the fraudulent representations.

Instruction number 10 is as follows: "The court instructs the jury that where one of two innocent persons must suffer from the fraud of a third, he who furnishes the means to commit it or whose recklessness enabled the third person to commit it must bear the loss." It is needless to say that a declaration predicated upon fraud and deceit cannot be sustained by proof that the defendant made it possible for a third person to commit fraud.

several particulars. The most important are that it omits to tell the jury that the false representations must have been made to the plaintiff; that the plaintiff must have relied upon them in the purchase of the stock and that she suffered a loss as a result.

Instruction number five tells the jury "that every person entering into a conspiracy to commit fraud is deemed in law a party to all acts done by any of the other parties, whether before or afterwards in the furtherance of the common design". The last sale of stock to the appellee was made on February 20th, 1915, under the evidence the jury could be led to believe by this instruction that the appellant might become liable to the appellee for the sale of the stock because of acts done in furtherance of the conspiracy subsequent to February 20th, 1915, or any other of the conspirators. It is evident that no representations of the co-conspirators subsequent to that date could be the cause of any liability to the appellee.

Instruction number 6 tells the jury that in the purpose of fixing liability upon a defendant they may consider the acts of the conspirators at any time between April 1912 and August 1919. As stated above, no liability to the appellee can be based on any act committed subsequent to February 20, 1915. All fraudulent representations must have been made before that time. We find no error in instructions number 7 and 8.

Instruction number 9 sets out first the liability of the appellant to the appellee in representations made to the appellee and might well have led the jury to believe that the appellant was liable to the appellee whether the appellee ever learned of the fraudulent representations.

Instruction number 10 is as follows: "The court instructs the jury that where one of two innocent persons must suffer from the fraud of a third, he who furnishes the means to commit it or whose recklessness enabled the third person to commit it must bear the loss." It is needless to say that a instruction predicated upon fraud and deceit cannot be sustained by proof that the defendant made it possible for a third person to commit fraud.

Instruction number 11 is erroneous in assuming to state all the facts upon which a recovery might be based and directing a verdict, without stating that the appellee must have been deceived and must have suffered injury as a result of the deception to entitle her to a recovery.

Instruction number 12 is erroneous in that it grounds a civil liability to a purchaser of stock in an action of fraud and deceit against the directors for receiving property in payment of stock at a figure in excess of its actual valuation. This may account for the lessened value of the stock and form the basis of an action to enforce full payment, but it is not a fraudulent representation which can be made the basis of the recovery in this action.

Instruction number 13 is erroneous in that it is based in part upon matters not shown by the evidence and it assumes that the representations therein mentioned were fraudulent thus invading the province of the jury. The instruction directs a verdict.

Instruction number 14 is erroneous in directing a verdict for the sum of $20969.83 if the jury finds liability existed. The declaration consists of three counts each based upon a separate sale of stock to the appellee. Under the conflicting state of the evidence, the jury might well have found that there was liability on one or two of the counts but not under the others. It was for the jury to find the amount of damages. The instruction should not have been given.

Several of the instructions also tell the jury that if the defendant knew or "should have known that the representations were false", that he is liable. The liability can only be predicated on actual knowledge. This expression substitutes negligence for actual fraud and should not have been used in the instructions given. (Moldom v. Ayer, 110 Ill. 448; Linington v. Strong, et al, 111 Ill. 152; Foster v. Oberreich, 230 Ill. 525).

It is also contended that the court improperly admitted evidence of the sale price at the bankruptcy sale of the assets of the Mercantile Agency to prove the value of the assets turned over to the

United Agency. Under the averments, of the declaration, we think the evidence was properly admissible. No motion was made to instruct the jury that it could not be considered in finding the actual value of the assets of the United Agency. For that reason the objection cannot be considered by us.

For the errors indicated above, the cause must be reversed and remanded to the circuit court of De Kalb County for another trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

4062

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 629

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7289 Agenda No. 8

Marjorie Sahlberg, Appellee

vs. Appeal from Lake.

Sam Sahlberg, Appellant

Jones J:

235 I.A. 629

The appellee, Marjorie Sahlberg, filed her bill for divorce against her husband, Sam Sahlberg, in the Circuit Court of Lake County, to the December Term 19[illegible], alleging as grounds therefor, extreme and repeated cruelty. The bill, as originally filed, did not allege any specific dates, upon which the acts of cruelty were commited, but subsequently, the appellee amended her bill by alleging two specific dates. The cause was heard by the Chancellor without a jury.

The main grounds urged for a reversal of this case are that the decree does not sufficiently find jurisdictional facts to make a valid decree and that the evidence is not sufficient to sustain the decree.

The only finding with reference to jurisdiction is "that the Court has jurisdiction of the subject matter and of the parties to this cause, and that the equities of said cause are with the complainant." It is urged that there is no evidence in the record that the appellee resided within the state of Illinois for more than one year immediately preceding the filing of the bill of complaint. The allegations of the bill are and the proof shows that the acts of cruelty complained of were committed within the state of Illinois.

Section 2 of the Divorce Act provides, "No person shall be entitled to a divorce in pursuance of the provisions of this Act, who has not resided in the State one whole year next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state."

Section 5 of the Divorce Act provides, "The proceedings shall be had in the county, where the complainant resides, but process may be directed to any county in the state."

It thus appears that where the offense complained of was committed

in this state the bill must be filed in the county where the complainant resides, but he or she need not have resided in the state one whole year next preceding the filing of the bill. It is sufficient to confer jurisdiction that the complainant was an actual resident of the state at the date of the filing of the bill. Such facts must be shown by the record, but it is sufficient if they appear in the certificate of evidence to which resort may be had to ascertain the fact. We are of the opinion jurisdiction is shown.

As noted above the bill charged only two specific acts of cruelty. One of them charged that on or about September 1, 1922, the defendant struck the complainant and the other charged that on October 15th, 1922 the defendant again struck the complainant. Upon an examination of the evidence, it appears from the testimony of the complainant that on the first occasion the defendant slapped the complainant. Between that and the second act charged the parties separated and on October 15, 1922 the defendant returned to the home to secure one of the children. He took the child in his arms and carried it to his automobile, where the complainant undertook to take the child from him. Her testimony is that he grabbed her by the arm and threw her down. Upon neither of these occasions was the complainant in any danger of serious bodily injury; indeed the defendant testifies that on both occasions, he merely pushed the complainant out of his way. Complainant is uncorroborated as to the first circumstance, but is corroborated as to the second.

The only other testimony relating to cruelty is that the defendant was of a harsh nature given to sudden bursts of temper and that he threatened the life of the complainant. He owned a revolver. There is no evidence, however, that he did anything toward carrying out such threats. The defendant denies having made any threats. A great deal of the record is taken up with testimony that the defendant did not take the complainant with him when he attended motion picture shows or went riding in the evening, and that his language to her was frequently course and profane. He was jealous of her and upbraided her for her attentions to other men. It is true that the complainant and two other witnesses frequently speak of the defendant as "acting like a mad man." But this is a mere conclusion. There is also some testimony that he mistreated his mother-in-law with whom the couple lived and also his brother-in-law and at one time struck

is

his brother-in-law. Manifestly these acts not being directed toward his wife, could not be the basis of a decree in her favor for a divorce.

It has repeatedly been held that extreme and repeated cruelty means physical acts of violence amounting to bodily harm, or which raise a reasonable apprehension of bodily harm and show a state of personal danger, incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions or angry or abusive words are not sufficient grounds for divorce for extreme and repeated cruelty. (Trenchard v. Trenchard 245 Ill. 313; Maddox v. Maddox 189 id. 152; Fizette v. Fizette 146 id. 328.)

While we are mindful of the rule that the decree of the chancellor will not be disturbed, unless manifestly against the weight of the evidence, still in this case, we think that the evidence of the complainant fails to meet the requirements of the law and that the decree must therefore be reversed and the cause remanded.

In passing it is well to call attention to the fact that the decree in this case as presented to the trial court is extremely faulty in findings of fact. It is only by inference that it finds that the parties were ever married. It does not find specific facts showing jurisdiction and the findings relative to the cruelty charged are in general terms only. In all of these matters, resort must be had to the certificate of evidence to support the decree. Indeed the decree is so faulty, that we would almost be justified in reversing and remanding the cause for that reason alone.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov., in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

401 p

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 629

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 25

General No. 7327

235 I.A. 629

Philip H. Ward,
Appellee

v.

Abe L. Wolber and Aug.
F. Stern, Appellants

Appeal from Circuit
Court of White-
side County.

Jones J:

The appellee Philip H. Ward obtained judgment by confession in the circuit court of Whiteside County upon a promissory note made by Abe L. Wolber and Aug. F. Stern, payable to James Moore by whom it was endorsed to the appellee. The appellants afterward moved to open up the judgment and for leave to plead. This motion was allowed and the appellants filed a plea of the general issue and two special pleas, one alleging fraud in obtaining the note, the other alleging want of consideration.

At the conclusion of the testimony for the defendant the plaintiff moved for a directed verdict which was granted. The question then is whether the evidence is sufficient to require its submission to a jury upon the plea of fraud or upon the plea of want of consideration. If so, the court erred in refusing to submit it to the jury. The rule is that a verdict should not be directed in favor of the plaintiff where there is any evidence fairly tending to support the pleas. (Bailey v. Robinson 233 Ill. 614 and cases there cited.)

The facts upon which the case is based are that Delbert Wolber, son of the appellant Abe L. Wolber was charged by James Moore and Ammerilla Moore with the seduction of their daughter Alice Moore, who was then at the age of fourteen years. They further charged that as a consequence of the illicit intercourse, Alice Moore became pregnant, Delbert Wolber, at the time, was seventeen years of age. It seems to be conceded that the first act of intercourse occurred on February 6th, 1921, and that there was only one other like occurrence three days later. James Moore

consulted the plaintiff Philip H. Ward, who is an attorney at law, practicing in Whiteside County. Ward wrote Abe L. Wolber a letter in which he told him that his son was guilty of a felony for which the maximum penalty is life imprisonment in the penitentiary; that the law does not permit any settlement of that charge. He further told him that his son was liable under the Bastardy Act, and that the parents of the girl had a right of action against him. He asked him to come to his office at once. This letter was written on February 12, 1921. Wolber did not see Ward on February 15th, acting on the advice of Ward, the Moores instituted proceedings under the Bastardy Act and caused the arrest of Delbert Wolber on a warrant. A hearing was had on February 22nd. At the hearing Delbert Wolber was bound over to the next term of the county court.

That same day, however, Ward and the Moores entered into negotiations with Abe L. Wolber looking toward a settlement of all of the matters involved and a settlement was concluded that day. The Moores first demanded $1100 being the full amount allowed by statute under the Bastardy Act and when Wolber refused to pay that amount, they then reduced the demand to $800. Appellant Wolber accepted this offer and paid $200 in cash and gave two promissory notes of $300 each, in payment of the balance. A written memorandum of settlement was entered into which recited in substance that Alice Moore being a minor was unable to execute an agreement for herself and that James Moore and Ammerilla Moore, having certain claims and demands against Delbert Wolber, in addition to the claim of Alice Moore and in settlement of all civil rights, it was agreed that the payments above mentioned should be made in consideration of which the Moores released and quit claimed any right of action they might have against the said Delbert Wolber and agreed to save and keep harmless the said Delbert Wolber from any action of a civil nature by Alice Moore. The agreement further provided that Delbert Wolber and Alice Moore should be married as soon as possible and that their respective parents would give consent to such marriage. This agreement was signed by the respective parties. Before entering into the contract and before the cash payment of the $200 and before the execution and delivery of the notes, Ward as-

certained by telephone that it would be possible to have the Clerk at Clinton, Iowa, meet them at his office and issue a marriage license, notwithstanding that February 22nd was a holiday. This was done because the laws of Iowa permit the marriage of a girl fourteen years of age, with the consent of her parents.

Immediately after the delivery of the agreement and the notes the parties went by automobile to Clinton, Iowa, where the young couple were married. They have since lived together at the home of Abe L. Wolber. It later appeared that Alice Moore was not in fact pregnant as charged and that there was no liability on the part of Delbert Wolber under the Bastardy Act.

It appears from the evidence that before the day of the settlement Abe L. Wolber had consulted the State's Attorney of Whiteside County to ascertain what the liabilities of his son were, if the charge were true. He also took the written agreement to the State's Attorney on the day of settlement before consummating the transaction. The state's attorney advised him that was the best he could do. Wolber testifies, however, that the state's attorney, at no time told him that the marriage of Alice Moore and Delbert Wolber would be a bar to any criminal action which might be instituted against Delbert Wolber and would abate the action already begun under the Bastardy Act. The appellee carried on all of the negotiations for the Moores. He had full knowledge of every move made and full knowledge of every representation made to Abe L. Wolber to secure his signature to the notes and to the agreement. If there was fraud he not only knew of it, but participated in it. There is nothing in the record from which there can arise the slightest surmize that Abe. L. Wolber knew that the marriage of Delbert Wolber to Alice Moore would have the results it did have. So far as the record is concerned, he was induced to make the payment of the $200 and to execute and deliver the notes by hidingffrom him that fact. While the appellee and his clients the Moores were sedulously working to secure the payment of a large amount of money to them, not by Delbert Wolber, who was liable therefore, but by his father, who was not liable, and by Aug. F. Stern, who signed as a surety for Abe. L. Wolber, they were at the same time carrying out a course

of action, which when consummated was a complete bar to the liabilities of Delbert Wolber under the criminal code and the bastardy act.

It is contended that the fact that Ward told Wolber that the criminal charge could not be settled is evidence of good faith. But, we are forced to the conclusion that the only purpose of injecting that element of the case into the discussion was to induce Wolber to make the settlement and hush the whole case up. In our view of the case, far from being an element showing good faith, it was a lever used to work upon the fear of the defendant and to distract his mind from the real points sought to be covered by the settlement and the written agreement. Wolber was not permitted to forget that his son might be convicted of the crime of rape, and he was evidently led to believe that if he made this settlement, that charge would be dropped. There was evidence of fraud which should have been submitted to the jury.

Upon the plea of want of consideration, there is no difficulty with respect to the bastardy proceedings. In the first instance, the money in a bastardy prodeeding is to be paid, under the Statute, not to the grandfather of the child but to the mother of the child for its support. The agreement in this case provided for the payment to the father of Alice Moore, Further than that, the payment to James Moore was no bar to a suit by Alice Moore. The marriage of Alice Moore to Delbert Wolber barred this action. The cash payment, the execution and delivery of the notes, the agreement for the marriage of the young couple and their immediate marriage were all a part of one transaction so that James Moore sought to secure the payment of $800 and at the same time to place the legal liability for the support of the child upon Delbert Wolber by his marriage to Alice Moore. It is certain that the Moores sought to bind Delbert Wolber twice over for the same obligation.

Is the release of the right of action of the father for the injury resulting from the seduction of his daughter a good consideration for the payment and the notes? The point urged is that the marriage of Alice Moore abated any action for seduction on the part of her father.

"If the minor daughter be under the control of the father so that he has a right to command her services he may maintain an action for her seduction." (Ball vl Bruce 21 Ill. 161; White v. Murtland 71 Ill. 251) In this case Moore had a right to the services of Alice Moore at the time he accepted the notes and emancipated his daughter by consenting to her marriage to Delbert Wolber. The right of action against Delbert Wolber for seduction was complete. Moore's release of this right of action furnished a valid consideration for the notes. The emancipation of Alice Moore did not bar the right of action (Eicher v. Kistler 14 Pa. St. 282; Pruitt v. Cox 21 Ind. 15; 25 Am. & Eng. Cyc. of Law 2nd Ed. P. 193 35 Cyc. 1306; 34 R.C.L. 748.) The ruling of the Court with respect to the plea of want of consideration was correct.

But for the error in not submitting the case to the jury upon the plea of fraud, the case must be reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7365 Agenda No. 50

The Aetna Casualty and Surety Co.
a Corporation, et al
appellant,
vs.
East Mapleton Co-operative Coal Co.
A Corporation
appellee.

Appeal from
County Court of
Peoria County.

235 I.A. 629

Jones J:

The appellants filed their suit in the county court of Peoria County against the appellee for the recovery of additional premiums alleged to be due appellants under the terms of a policy of Workmen's Compensation Insurance. The appellants consist of ten corporations known as the Associated Companies, who sue in their separate corporate names. The appellee is a co-operative corporation organized and existing under an act of the Legislature entitled "An Act to provide for the incorporation of co-operative associations for pecuniary profit enforced July 8th, 1915." The declaration consists of the common count and one special count. The appellee filed a plea of the general issue and one special plea alleging payment in full and gave notice of special defenses under the general issue, and also claimed a set-off in the sum of $20.34 for overpayment alleged to have been made. Upon the trial of the cause, there was a verdict for appellee in the sum of $20.34 and judgment on the verdict.

The appellee is a co-operative coal company incorporated by fifteen miners for the purpose of mining coal. Under the law, providing for such incorporation, none of the stockholders were allowed to hold more than five shares of stock of par value not less than $5.00 or more than $100 each. By the charter of the corporation, all of the incorporators were required to work in the mine purchased by the corporation. If any stockholder decide to quit at any time, he was required to offer his stock for sale to the corporation which had a period of ten days in which to accept the offer. If it were not accepted then he must sell to some other person who would take his place in the mine. The corporation paid no salaries to the stockholders. The compensation of the members depended entirely upon the net profits of the business after the payment of all expenses, the profits

being divided upon the basis of the amount of coal each member actually mined. After operating some time, the corporation employed two men about their mine and later a third. In June 1920 the appellee applied to appellants for compensation insurance. After corresponding with the company the agent to whom application was made, figured the premium on the basis of the payroll to the three employees estimated at $3600. The annual premium was $37.88 per $100.

The policy remained in force until December 18, 1920 when it was cancelled by appellants. There was no claim for compensation under the policy. The appellants claim that the premium should have been figured not upon the basis of the payroll of the three employees but should have included the fifteen stockholders and that as the gross income of the company was $19253.67 and the rate $3.83 per $100 the premium should have been $737.42. The suit was brought to recover the balance of $599.54.

As stated, by appellants, the questions in this case are whether or not the stockholders in a co-operative corporation for profit who are actually engaged in manual labor in and about the business of the corporation are employees with the terms of the policy and whether or not money received by the stockholders from the corporation the amount of which was based solely upon the amount of coal mined by each stockholder is remuneration within the terms of the policy.

There is much discussion in the briefs about the admissibility in evidence of the conversations between the agent for the appellants and the officers of the corporation before the execution of the policy. The objection of the appellants is that such evidence varied the terms of the written contract. We do not deem this testimony of great importance in the determination of the questions involved. The application and the policy constitute the contract.

The policy contained the following provision: "The foregoing enumeration and declaration of employees includes all persons employed in the service of this employer, in connection with the business operations above described to whom remuneration of any nature in consideration of service is paid, allowed or due, together with an estimate for the policy period of all such remuneration. This remuneration and description with the estimated remuneration should also include the President, any Vice President,

Secretary or Treasurer of this employer, if a corporation is actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman, but any such designated officer not so engaged shall not be included in such enumeration, description or estimated remuneration.'

It appears from the evidence that the officers of the corporation were five directors and a Secretary-Treasurer, but there were no bosses and no one who had control of and directed the work. Each man was required to work in the mine, and each appeared to be of equal authority and under the direction and control of no one in the prosecution of the work but the Secretary-Treasurer kept the records and received the funds of the company and upon the direction of the directors paid them out. The remuneration of the stockholders depended entirely upon the amount of profits the corporation made and the proportionate part of the coal mined by each stockholder. If there were no profits the stockholders received no compensation for their labor.

We find no case deciding the precise point here raised and counsel have cited none. It has been held that stockholders and officers of general corporations may be employed by the corporation and entitled to compensation under Workman's Compensation Acts, when their work is of the class that falls within the Workmen's Compensation Acts. (In Re Raynes 66 Ind. App. 321; Brown v. S.W. Brown Company 24 N.Y. 28.) See also Honnold on Workmen's Compensation Vol. 1 Page 173. But these are cases in which a general corporation has employed its own stockholders or officers to do manual labor. The corporation had complete control of the work performed by them. It could discharge them; it could change their compensation and they in turn might quit the work without losing their financial interest in the corporation or they might demand a different remuneration. In short they dealt with the corporation as any one having no financial interest in it. Here the fifteen stockholders must continue working for the corporation so long as they held their stock. No one controlled them in the performance of their work. The duties they undertook and the time they worked were matters left much to themselves and they did not work under the supervision of anyone. The fifteen stockholders reached mutual agreements in the dividion of labor much as the members of a partnership carry on business. The compensation of each was dependent upon the net profits of the company, and limited by the proportion of coal he dug to the total amount

of coal produced by all of the stockholders. Each in effect received the net sale price of the coal he dug and that was his only compensation. We are unable to see how this falls in the same class with a general corporation and we have reached the conclusion that the fifteen stockholders were not employees of the corporation in the sense that term is used in the policy. The Workmen's Compensation Act, provides that an employee shall be defined as "Every person in the service of another under any contract of hire express or implied, oral or written." The purpose of the insurance was protection against the provisions of this act. There was certainly no contract of hire, express or implied. We do not think that the fifteen stockholders were employees within the meaning of the provision of the Act. It therefore follows that there was no liability on the part of the company for the additional premium sued for.

There being no liability, any errors in the admission and exclusion of evidence and in instructions to the jury do not constitute reversible error. It is therefore unnecessary to discuss questions raised in that regard.

The judgment of the county court of Peoria County will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-four,

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

235 I.A. 629

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 7 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

nda No. 53 General No. 7361

linois Oil Co., Appellee,

vs.

l J. Mueller, Appellant,

Appeal from Circuit Court
of Rock Island County.

235 I.A. 629

oes J:

The Illinois Oil Company, plaintiff below, filed its suit against Carl Mueller in the Circuit Court of Rock Island County for the sum of $641.69. lintiff claims to have sold the defendant gasoline, lubricating oils, bar-s, underground tanks and accessories used in operating a gasoline filling tion. The declaration consisted of the common counts and with it plaintiff led an affidavit of claim setting forth the sale and containing an itemized tement of the articles alleged to have been sold to the defendant. The endant filed the general issue and three special pleas in abatement, all which were either adjudged insufficient on demurrer or withdrawn. Defen-nt also filed an affidavit of merits setting up that the defendant "did purchase the underground tanks, pony barrels, pails and watt lamps m plaintiff but from Frank P. Welch; that defendant owes nothing for lephone service; that the obligation for the gasoline and oil alleged to ve been sold by plaintiff is a partnership obligation of Mueller & Welch, partnership composed of defendant and one Frank P. Welch, and that the ld Frank P. Welch is living and has not been made a party defendant to this it."

Upon the conclusion of the evidence the court instructed the jury to find r the plaintiff with respect to the items of gasoline and oil amounting to 73.66. In obedience to the instruction of the court, the jury returned a rdict for the plaintiff for $473.66 but found for the defendant as to all her items.

The only question before the Court is the correctness of the instructio find for the plaintiff as to the gasoline and oils. It is contended by e plaintiff that since the affidavit of merits set up as a defense to the aim for gasoline and oils that the liability was that of the partnership Mueller & Welch and not of the defendant and that Welch was not made a

ty to the suit was not supported by a plea in abatement, evidence on the t of the defendant is not admissible to establish such defense. On the er hand, the defendant contends that while the affidavit of merits may not road enough to admit evidence of such defense by the defendant, that ertheless the plaintiff is required to prove his case in the first instance. opinion of the Supreme Court in the case of Harrison vs. Rosehill Cemetery Ill. 416 and the opinions of this court in Hunter vs. Troup 216 Ill. App. and Manufacturers' State Bank of East Moline vs. American Surety Company New York and William I. Taze, 230 Ill. App. 474 show that the true rule that the defendant is limited to the defense set up in his affidavit of its and admissible under his pleas, but this limitation on the defendant s not relieve the plaintiff of making proof of his claim. In this case, was not competent for the defendant to show under the general issue that plaintiff had failed to make necessary parties defendants to the suit, or offer any other evidence as a defense to the items upon which the verdict directed. The court properly excluded such evidence.

The correctness of the instruction in question then depends upon whether evidence of the plaintiff alone is sufficient to establish a sale. This es necessary a review of the evidence. It appears that in June 1917, the fendant Mueller owned a vacant lot at the corner of Second and Iowa streets the city of Davenport, Iowa. On the 11th of that month he entered into a itten contract of partnership for a period of five years with Frank A. Welch Rock Island, to establish and operate a gasoline filling station on this t. The defendant agreed to contribute to the partnership the use of the lot r five years rent free and Welch agreed to erect a suitable and proper ilding, oil and gasoline tanks, walks, driveways, pumps, pipe connections d other necessary accessories to the carrying on of the business at a cost t to exceed $2000. The contract further provided that profits and losses re to be divided equally. Books of account were to be kept and accounts ken each year. The taxes were to be paid out of the partnership funds. , at the expiration of the partnership, it were not extended, Welch had the ght to remove from the premises the gasoline and oil tanks, pumps, pipes d other accessories placed thereon by him in pursuance of the contract but the building and driveways. The parties proceeded under the contract and

station was operated for the entire period. Under its terms, neither party required to give his full time to the business, but Welch was made manager given control of the business.

The contract expired on Sunday. The following Wednesday, Mueller telephon- elch to meet him at the station to settle up the business. Welch came with W. G. Quayle. Welch was president of the Illinois Oil Company, ntiff, and Quayle was its Secretary. The latter was dead at the time of trial. Welch testified that the bargain with respect to the gasoline and was made between the defendant and Quayle and he did not hear it. Two named Seaton and Kinnamon were in charge of the station. After the versation Mueller took charge of the station. A little later, he received tatement from the Illinois Oil Company for $641.69, which was a copy of account here sued upon. The defendant refused to pay the bill because contended that the station was operated by the partnership of Mueller & ch and insisted that the tanks and accessories became his property by chase from Welch.

Upon the trial of the case, the defendant gave notice to the plaintiff produce any contract between the Illinois Oil Company and the firm of Mueller elch by which the company was operating the station. None was produced nor there any evidence of any contract under which it was operating the station. endant also called upon the plaintiff to furnish any contract by which David ton, who was in charge of the station was operating it as agent of the intiff. No such contract was produced nor was there any evidence of any tract under which he was in charge of the station.

Upon the trial, plaintiff offered evidence of a custom by which the company ecked agents into charge of stations and charged them with the supplies, oil l gasoline tanks, receptacles and accessories on hand and at the end of eir agency again checked the supplies on hand, crediting them with those on and at the end of the agency and made settlement upon a cash basis. This idence was all stricken out.

The Court admitted in evidence, over the objection of the defendant, aintiff's exhibit "B" purporting to be one page of a book of account. It pears from the evidence that this book of account consisted of the in- ices of all sales made by the company for the month of June 1912, kept in

e leaf book form. The plaintiff's Exhibit "B", an invoice covering goods claimed to have been sold to the defendant, was in this book. The ence further showed that the invoices were made by the man who made the and were sent in by him. In this particular case, when the witness ley checked out David Seaton from the station at Davenport, one of the istants made up a statement of the items credited to Seaton. For the pose of making up the charge against the defendant, Dooley copied the account Seaton. He then took it to the office where he turned it over to the head kkeeper F. R. Edwards. F. R. Edwards caused copies of this to be made, to-her with an additional invoice by stenographers in the office. They mailed additional invoice to the customer and entered the copy in the book. Only ley and Edwards were produced upon the trial. It is apparent that Exhibit is not a book of original entry. It is also apparent that the person who e the memorandum from which Exhibit "B" was made, was not produced to tes-y to its correctness. It is true that both Dooley and Edwards testify that is correct. Edwards had no personal knowledge that the memorandum was rect and Dooley copied it from a memorandum someone else made. We are of opinion that Exhibit "B" was not admissible in evidence. (House vs. Cook Ill. 290; Trainor vs. German American Savings Loan and Building Association Ill. 616.)

The plaintiff's case must rest upon proof of a sale to the defendant. testimony of Frank P. Welch, President of the Company, affirmatively shows t if there was any contract of sale made that it was made between the fendant and W. G. Quayle. There is no evidence of the conversation between latter and the defendant.

It will thus be seen that there was no competent evidence in the record to w that the plaintiff was operating the station or that the gasoline and oil question was sold to the defendant by the plaintiff. As we view the case, evidence is not sufficient to support the verdict and for this reason the rt erred in instructing the jury to find for the plaintiff. The case will refore be reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 4th day of May in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

General No. 7637 Agenda No. 18

October Term, A. D. 1923.

John E. Hollon, Appellee

vs.

City of Quincy, A Municipal Corporation, Appellant

Appeal from Adams.

NIEHAUS, J.

This appeal is from a judgment for $2334.00 recovered against the appellant, The City of Quincy, by the appellee, John E. Hollon, for personal injuries suffered by him from a fall on a sidewalk on the easterly side of Sixth street, which is alleged to have been defective, at a point where an alley intersects Sixth street between Vermont street and Broadway. The declaration alleges, that the defect in question was in the granitoid or cement sidewalk, and was " a worn out place or depression elliptical in shape and of the length of to-wit, two feet and of the width of, to-wit, twelve inches in the widest place, and of the depth of, to-wit, three inches." The accident occurred about seven fifteen o'clock in the evening of January 22, 1922. The appellee at the time in question was on his way to attend church services at the Central Baptist Church, at the corner of Seventh and Vermont streets: and was accompanied by his wife and another lady. When he had reached the east side of Sixth street, he started south on Sixth street. He testified concerning the accident, as follows: "I started south on the east side of Sixth street. I was carrying my cane. When I reached the spot about midway between Vermont and Broadway on the sidewalk on the east side of Sixth street, I fell and broke my leg. The sidewalk was covered with snow. There was snow on the ground and the sidewalk up to this crossing opposite the alley was not cleaned of the snow. It was not so very dark and it appeared to me to be kind of a beaten path where the traffic had been. It appeared to me like the ice had formed

there by the edge of the beaten path, probably the snow had worn out, thawed and formed ice. I went over to

the right side where the snow was not beaten down and had not formed ice and walked upon the snow and stepped into this defect in the sidewalk and fell and broke my leg * * * * * * I had seen the crossing before and had passed over that place before. I don't remember when, I know since I have been in Quincy I have gone by there. I always go up there. I probably have passed there but not frequently. I never knew there was a bad place in that alley crossing."

It is contended by the appellant, that the alleged defect or depression in the sidewalk in question was not of such a character that the city was guilty of negligence in not repairing it, or remedying the condition caused thereby. The witnesses differ somewhat, on the question of the extent and depth of the depression or hole which the evidence shows to have existed in the walk; but the proof tends to show that it was several feet in length, varying in width and depth; but the testimony of at least two witnesses, with reference to the character and nature of the depression or defect appears to be rather significant on the question referred to. Jack Rudd, an employe of the Overland Car Company, who drove cars for the company, testified with reference to the depression, that while he didn't pay much attention to it, merely driving over it, and that he just pulled around it. To use his own language, he said "I did not aim to run into it; I did always aim to shy around it." Mrs. Ruby Smyser, another witness, related her experience with the alleged defect when she pushed a baby buggy over the place in question shortly before appellee's injury, as follows: "I had the two smallest children in the baby buggy and lots of other things, and I got into that place, and it was rather hard to push out of it. As I was going across the walk the buggy wheels kind of got down into that hole about middleways." As to whether the alleged defect or depression was of such a character as to render the sidewalk less safe in its ordinary use by pedestrains who would use it exercising due

care for their own safety under the circumstances here presented was a question of fact for the jury. The jury found against the appellant on this question, and we cannot say that they were not warranted in so finding, or that their conclusion is manifestly against the weight of the evidence on that point.

We find no error in the admission in evidence of the X-ray plates, a sufficient foundation having been laid for their introduction; nor do we find any error in the giving or refusal of instructions. We do not find that Instruction No. 6 given for the appellee is subject to the criticism made of it; nor was there any error in the modification of the instruction concerning the form of the verdict by giving the directions to the jury concerning the signing of the verdict. Instruction No. 34 requested by the appellant was properly refused because it had a tendency to confuse and mislead the jury on the question as to whether an alley crossing could be a sidewalk; and for that reason alone was properly refused. Instructions No. 35 and 36 were properly refused by the court, because the matters of law contained in the instructions to which the appellant was entitled, were embodied in other instructions which were given. No. 36 does not correctly state the principle of law involved in this case by the presence of the snow or ice on the sidewalk in question. While it is true, that if the snow or ice on the sidewalk rendered the walk slippery, and the slippery condition of the walk was the proximate cause of appellee's fall, there could legally be no recovery against the city, this instruction apparently has reference to a different proposition, and presupposes the presence of ice or snow in such quantities as to amount to an obstruction to travel. The evidence concerning the presence of ice or snow on the side walk does not justify the inference that appellee's fall was caused, or could have been caused by such an accumulation of snow or ice in the depression in question which

might or might not be regarded by the jury as an obstruction to travel. The instruction was therefore misleading and properly refused. The

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record does not disclose any reversible error, and judgment is therefore affirmed.

Affirmed.

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3954a

235 I.A. 630

General No. 7640 Agenda No. 21

October Term, A. D. 1923.

Roy C. Helton, Administrator of the Estate of Shiloh L. Kerrick, Deceased, Appellee

vs.

W. H. Bandy, Appellant

Appeal from County Court, Edgar County.

NIEHAUS, J.

In this case the appellee Roy C. Helton, as administrator of the Estate of Shiloh L. Kerrick, deceased, sued the appellant W. H. Bandy in the county court of Edgar County, to recover from the appellant, the sum of $337.50 for four and one half years rent which he claimed accrued to the deceased, prior to her decease. The deceased died January 16, 1917; and the rent was claimed for premises occupied by the appellant, which he afterwards became the owner of. Suit was instituted March 23, 1923. The declaration consists of the common counts, which were supplemented by a bill of particulars, showing the nature of appellee's demand. The appellant pleaded the general issue, and the statute of limitations. There was a trial by the court, and a finding and judgment in favor of the appellee for $193.50. From this finding of the court and judgment this appeal is prosecuted.

No propositions of law were submitted to the court on the trial, therefore no questions of law are before us for consideration in a review of this case. Cincinnati I. & W. R'y. Co. v. People 205 Ill. 538; Grand Pacific Hotel Co. v. Pinkerton 217 Ill. 61.

This case comes directly within the rule announced in Ryan v. Schutt, 135 Ill. App. 554, namely: "No propositions of law were submitted to the trial court, and it must be presumed that the court applied the law correctly. There is nothing for us to review except such questions as may arise upon the rulings

upon the evidence or upon the pleadings, and the sufficiency of the evidence to support the finding."

We find no reversible error in the admission or rejection of evidence by the court; and are of opinion that the evidence is sufficient to warrant the court in reaching the conclusion, that the appellant was the tenant of Shiloh L. Kerrick deceased, and occupied her premises as tenant until he became the owner thereof, from January 16, 1917 until July 2, 1921, with the understanding that he was to pay rent therefor at the rate of $75.00 per year during such occupancy. The evidence does not show that any new promise was made by the appellant to pay this debt after the statute of limitations had begun to run, either to the deceased or to the administrator of her estate. It is apparent, that in finding the amount due, the court aimed to give force and effect to the plea of the statute of limitations; and to allow only the amount of rent which accrued within the five years prior to the commencement of the suit. It is contended however, that assuming this to be the fact, the amount allowed by the court is $8.92 too much. Concerning this contention, it is sufficient to point out that this question was not raised in the court below; nor is it raised by any of the assignments of error; it is therefore not properly before us for consideration and decision. We find no reversible error in the record and the judgment is affirmed.

Affirmed.

235 I.A. 630

General No. 7649 Agenda No. 30

October Term, A. D. 1923

Amy E. Campbell, Appellee

vs.

Kent Campbell, Appellant

Appeal from Hancock.

NIEHAUS, J.

The appellee, Amy E. Campbell, filed a bill of complainant against her husband, Kent Campbell, the appellant, alleging that she was living separate and apart from him without her fault, and in consequence of a fault of her husband, whom she charges with acts of extreme and repeated cruelty towards her; and with adultery. Afterward she filed a petition praying for alimony, pendente lite, for the support of herself and the minor child of the parties, and for an allowance of solicitor's fees to pay her solicitors; also for an allowance to enable her to prosecute her suit. As a basis for the alimony to be allowed, the petition sets up, that the appellant is the owner of real and personal property amounting in value to about $36,000.00, and that he has an income from his farm, and from the seed business in which he is engaged, of about $5000.00 a year. The appellant in reply filed an affidavit in which he sets up his property interests in detail; and he estimates the total value of his real estate and personal property including a deposit of $1060.99 in the bank, to be about $37,938.00; but deducting the amount of encumbrance against the real estate, and the debts which he claims he owes, the actual net value of his property holdings is placed at $13,000.00; and that his net income is about $1800.00 per year. The court entered a temporary order allowing the appellee $100.00 per month as alimony pendente lite, and $200.00 for solicitor's fees for her solicitors, and $100.00 to enable her to properly prepare her case for trial. From this order an appeal is proescuted.

It is insisted that the allowances made, are excessive. Allowances for alimony usually present rather difficult

problems for determination, and as a rule the question of what is just and reasonable depends upon the particular facts of the instant case. Vrey few cases are just alike, and the matters involved therefor present a very wide field for the exercise of judicial discretion. The question to be considered on this appeal is, whether that discretion has been abused. Taking into account the necessities of the appellee and of the minor child, and considering in connection therewith, the amount of property possessed by the appellant, which even at his own estimate, is considerable; and the amount of his admitted income, his available means, and his ability to pay the amounts fixed by the court, together with the fact that the allowances made for alimony are merely temporary in character, until the merits of the controversy can be heard and finally determined, we are of opinion, that they are not excessive, nor unreasonable. The order is therefore affirmed.

Affirmed.

235 I.A. 630

General No. 7660 Agenda No. 39

October Term, A. D. 1923

G. L. Armstrong, Appellee

vs.

Peabody Coal Company, Appellant

Appeal from Christian.

NIEHAUS, J.

In this case the appellee Dr. G. L. Armstrong sued the appellant, Peabody Coal Company, to recover the sum of $15.00 which he claimed to be due him, for professional services, rendered to Arthur Metz, an alleged employe of the appellant company. Metz had been injured about November 1, 1921, while operating a drilling machine at a coal mine near the city limits of Taylorville, known as Mine No. 58; and Dr. Armstrong was called to attend him by some one from the Wallace Undertaking Establishment in Taylorville; and the doctor gave first aid to Metz for his injuries. The proof conclusively shows, that Mine 58 was operated by the Springfield District Coal Company, and not by the appellant; and that Metz was an employe of the Coal Company last mentioned. There is no proof in the record that Dr. Armstrong performed the services referred to at the instance or request of the appellant, or that they had authorized any one to call the doctor to render the services. The record therefore does not disclose any legal basis for a recovery against the appellant; and the judgment must therefore be reversed.

The judgment is reversed.

Finding of facts to be incorporated in the judgment. The evidence does not show that the services of the appellee were rendered at the instance or request of appellant.

Reversed.

General No. 7671 Agenda No. 42

October Term, A. D. 1923.

Clara L. Janssen, Appellee

vs.

H. F. Janssen, Appellant

Appeal from Sangamon.

NIEHAUS, J.

This suit in assumpsit was commenced in the circuit court of Sangamon county by the appellee Clara L. Janssen against her husband, H. F. Janssen the appellant. A recovery is sought on three promissory notes made by the appellant, and delivered to the appellee, which are dated December 9, 1918. The notes are payable to the order of the appellee; one note for $1000.00, is payable six months after date; another note for $1000.-00 is payable eighteen months after date; and one note for $2000.00 is payable two years and six months after date. All the notes draw interest at the rate of five per cent per annum, payable semi-annually. The defense of the appellant is embodied in a special plea, which alleges that the notes were given to the appellee without any good or valuable consideration; that the notes referred to were given to the appellee at her request after her return from divers sanitariums and hospitals, kept and maintained for the treatment of persons suffering from insanity, and mental and nervous disorders, where the appellee had recently before that time been under treatment for such mental and nervous disorders, and from which, in the judgment of the appellant, she was still suffering, and had not fully recovered; and the appellant, in an endeavor to alleviate her suffering and better her physical, nervous and mental condition, and believing, that the giving of said notes, would so alleviate her said suffering, and better her physical, nervous and mental condition gave the same to the appellee. A trial by jury resulted in a verdict for the appellee, fixing her damages at $2425.00. The court rendered judgment on the verdict, and this appeal is prosecuted from the judgment.

It is argued for reversal of the judgment, that the verdict is contrary to the law and the evidence. The appellee testified, that the notes in question were given to her by appellant in settlement of an indebtedness which she claimed was due her, and which indebtedness grew out of a number of financial transactions conducted by appellant for her; and concerning her separate property; and the notes in question (together with one other note not due) represented the amount which was agreed upon between them in an accounting had, as the amount of the indebtedness. Her testimony concerning the accounting and settlement, was corroborated by the evidence of her son; also by a number of circumstances appearing in evidence with reference to the property involved, and the transactions between the appellee and her husband with reference to the same. The jury were therefore fully warranted in reaching the conclusion that the appellee's verison of the matter was the true one, and this court would not be justified in setting aside the jury's verdict under these circumstances.

It is also contended, that the verdict is wrong because if the appellee was entitled to recover, that the amount should have been larger, that is, it should have been the full amount of the notes and interest. It is sufficient to point out in reference to this contention that appellant was not harmed by this error, and therefore is not in position to raise any objection thereto. No questions of law are presented for consideration, or involved in this appeal. For the reasons stated the judgment is affirmed.

Affirmed.

235 I.A. 631

General No. 7675 Agenda No. 45

October Term, A. D. 1923

The People of The State of Illinois, Ex Rel,
Helen Stewart, Appellee
vs.
James Ray, Jr., Appellant

Appeal from County Court Sangamon County.

NIEHAUS, J.

In this case a complaint was filed before a justice of the peace in Sangamon County by Helen Stewart, charging that James Ray, Jr., the appellant, was the father of an unborn bastard child. The justice on preliminary hearing held the appellant under recognizance to answer the charge in the county court; and after the child was born, there was trial by jury in the county court, and a verdict rendered which found that the appellant was the father of the child. The court thereupon rendered judgment, requiring the appellant to pay the sum of $800.00 in installments in accordance with the requirements of the statute; and to furnish a sufficient bond to secure the payments required. This appeal is prosecuted from the judgment.

The principal ground urged on appeal for reversal of the judgment, is that the guilt of the defendant is not shown by a preponderance of the evidence. The appellant denied that he had had sexual intercourse with the prosecutrix at the times specified by her in her testimony; he also denied, that he had sexual intercourse with her at any time. Whether there was a preponderance of the evidence against the appellant depended upon what credence the jury placed in the testimony of the respective parties; if they were satisfied that the prosecutrix told the truth about her relations with the appellant, then necessarily it would follow, that they did not believe the appellant; and a preponderance of the evidence would thereby be established. The matter of the credibility of the witnesses is peculiarly a question for the jury to pass upon and determine. Johnson v. People 140 Ill. 350.

Complaint is also made of the giving of the following instruction, namely, "And you are further instructed that, if, after considering all the evidence in the case, you believe from the evidence that any witness has knowingly and wilfully sworn falsely as to any matter material as to the issues upon trial, you have a right to entirely disregard the evidence of such witness, excepting in so far as the same is corroborated by other credible evidence or circumstances appearing in the evidence in the case." The objection urged to the instruction is, that it does not correctly state the rule as to the extent to which a jury may disregard the testimony of a witness who has been impeached; that the instruction should have read, that the evidence of such witness may be disregarded by them except insofar as the same may be corroborated by "facts and circumstances in evidence," instead of "by other credible evidence or circumstances appearing in evidence in the case," as stated in the instruction. While it is true that the language suggested by appellant is customarily used in instructions of this character, the language in the instruction is substantially to the same effect, and the jury undoubtedly would get the same idea concerning the matter from the use of either phrase.

We are of opinion that there was no reversible error in this feature of the case. For the reasons stated, the judgment is affirmed.

Affirmed.

235 I.A. 631

General No. 7691 Agenda No. 57

October Term, A. D. 1923

William Schuman, Appellee

vs.

A. J. South and Fred South, Appellants

Appeal from Piatt.

NIEHAUS, J.

William Schuman, the appellee, on or about August 18, 1921, purchased from the appellants, A. J. South and Fred South, 13 hogs, to make up a carload, for shipment to the market from Hammond, Illinois. The appellants, who reside near Hammond, delivered the hogs to the appellee on August 19, 1921, at the Hammond Stock Yards, which are located about a half of a mile from the farm of appellants, where the hogs were kept at the time of the sale. The hogs were delivered by the appellants in the morning of the day mentioned; and it was a very warm summer day, the temperature ranging between 84 and 95 degrees Fahrenheit during the day. At the time of the delivery of the hogs, the temperature was 92 to 95 degrees. The hogs at the time of the delivery were apparently in good health, and the appellee paid for them at the time they were delivered. Shortly after the delivery, however, while they were still in the stock yards at Hammond, some of them showed signs of physical distress and sickness; when the appellee noticed, that the hogs were in distress and had become sick, he called in a veterinary who examined them and treated them. During the day six of the hogs died. The veterinary testified, that he made a post mortem examination, to ascertain what caused them to die, and that in his opinion the illness and death was caused from overfeeding the hogs, which resulted in an impaction of food in the stomach and acute indigestion. It is claimed by the appellee that he purchased the hogs from the appellants under a warranty, that the appellants had guaranteed the hogs to be as good as he could buy for shipping purposes; that they would be as fine as any he would have in his load; and he sued the appel-

lants for damages basing his action on the alleged breach of the warranty. Suit was commenced before a justice of peace of Piatt county, where a judgment was rendered in favor of the appellee; an appeal was prosecuted to the circuit court, and a jury trial was there had, which resulted in a judgment against the appellants. This appeal is prosecuted from the judgment.

It is well to point out that the abstract filed by the appellants is not complete, and does not comply with Rule 22 of this court; it does not show what the verdict of the jury was; nor against whom it was returned, nor in what amount; nor does it show the amount of the judgment rendered against the appellants. Under these circumstances it is proper to affirm the judgment for this reason alone. Deterding v. Central I.. Pub. Service Co. 223 Ill. App. 374. We have examined into the case, however, at least sufficiently to ascertain that the real question involved is, whether the hogs in question died of syncope or the effects of the heat which prevailed on the day of delivery, or died from being overfed, which resulted in acute indigestion. This was peculiarly a questoin of fact for the jury's determination. There is sufficient evidence to sustain the verdict of the jury. It is well settled, that the verdict of a jury should not be disturbed on questions of fact, unless the verdict is clearly and manifestly against the weight of the evidence. Granite City Lime & C. Co. v. Hanover Life Ins. Co. 194 Ill. App. 88; Freeman v. Chicago & Joliet Electric R. Co. 208 Ill 350.

The judgment is affirmed.

Affirmed.

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235 I.A. 631

General No. 7661 Agenda No. 62

October Term, A. D. 1923

Ethel C. Coddington, and Ethel C. Coddington as guardian for Mildred I. Coddington, Barrett C. Coddington and Madeline M. Coddington, Appellants

vs.

Frank S. Bevan, executor of the Will of Louis Coddington, deceased, and Harry Lewis Freeman and George B. Freeman, Appellees

Appeal from Circuit Court of Logan County.

SHURTLEFF, J.

This is an appeal from a decree of the Circuit Court of Logan County, dismissing, for want of equity, the bill of complaint of appellants. The facts disclosed by the evidence and which were not contradicated by the proofs, were as follows:

Charlotte A. Coddington, wife of Louis Coddington, prior to March 2, 1917, received by inheritance from the estate of her father, Freedom S. Appelgate, the sum of ten thousand dollars, which sum Charlotte A. Coddington who was usually called Lottie Coddington, deposited on March 2, 1917, in the People's Bank of Atlanta, Illinois, on demand certificate of that date, payable to Lottie Coddington, on presentation of said certificate, and bearing interest, if held six months or a year, at three per cent per annum.

Some time after receiving the money, probably during her last illness, the exact time not being disclosed by the evidence, Lottie Coddington called her husband, Louis Coddington, and their only child, Cleveland Coddington, to her room, and in the presence of

Cleveland Coddington, made an arrangement as to her money and the amount she had received from her father's estate. They asked Cleveland Coddington if this was satisfactory to him, and he replied that it was.

Lottie Coddington died intestate March 21, 1918,

leaving her husband, Louis Coddington, and her son, Cleveland Coddington, as her only next of kin.

By the statute of the State of Illinois, Louis Coddington was entitled to one-third of the money owned by Lottie Coddington at her death and Cleveland Coddington to two-thirds, in the absence of an agreement to the contrary.

No administration was taken out on the estate of Lottie Coddington, Cleveland Coddington being an adult.

On May 9, 1918, Louis Coddington and Cleveland Coddington met at the People's Bank of Atlanta, Illinois, and there presented the certificate of deposit in the sum of ten thousand dollars which both, then and there endorsed with their own names. They also presented a certificate of deposit in the sum of four hundred dollars, issued to Lottie Coddington, and cashed that.

With the ten thousand dollar certificate they received accrued interest from March 2, 1917, to May 9, 1918, at three per cent, being $355.83.

On the day of cashing said ten thousand dollar certificate, Louis Coddington and Cleveland Coddington subscribed for ten thousand dollars par value of third Liberty Loan Bonds of the United States in denominations of one thousand dollars each, to be registered, five thousand dollars in the name of Louis Coddington and five thousand dollars in the name of Cleveland Coddington, which bonds were after that date received by the bank and after

being kept together some time, in the bank, seem to have been delivered over to the owners.

The accrued interest on the ten thousand dollar certificate and the four hundred dollar certificate, with interest, all of which were part of the estate of Lottie Coddington, were taken by Louis Coddington and placed to his credit in said bank and afterward checked out by him.

In the year 1919 Louis Coddington purchased and procured to be registered in his own name two thousand dollars par value of Fourth Liberty Loan Bonds of the United States, in denominations of one thousand dollars each.

After the death of Lottie Coddington, Louis Coddington moved into the home of his son Cleveland Coddington, and lived with him, during the summer, spending his winters in California.

Louis Coddington and his family were very intimate friends of A. L. Dawes and his wife, who had known Louis Coddington over forty years.

Mr. Dawes and his wife spent their winters at Long Beach, California, and in the winter of 1919 Louis Coddington, who was also spending his winters there, came to their apartment nearly every day.

Some time before Christmas, in December, 1919, while talking with Mr. and Mrs. Dawes in their apartment about the property of his wife, Louis Coddington had a talk with Mr. and Mrs. Dawes, about which Mr. A. L. Dawes testified as follows:

A "He said that when Lottie got her money, that they called Cleve in, and she asked Cleve if he had any objection of her turning this money over to his father, Louis, and she says, 'You know you will get it all anyhow, you are the only child.' "

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Q "Did he at any other time while he was out there have any talk with you and your wife, concerning the property or funds of his wife's estate or their disposition?"

A "Well, he—I don't remember whether he said any more about those bonds. Of course, he talked, he said to encourage Cleve he bought five thousand bonds in Cleve's name."

Testimony of Mrs. Alice Dawes:

Q "What did he say?"

A "He said Mrs. Coddington had told him he might have the use of her money his life time, and that they had—they bought the bonds, and they asked Cleve if he was satisfied that he should have five thousand and Cleve five thousand, and at his death Cleve was to get them all, get all the money."

"The Court: Wait a minute. I don't quite understand your testimony, Mrs. Dawes. I wish you would tell me what was said there, again, as near as you can."

A "He said that Mrs. Coddington told him he might have the use of her money his lifetime and at his death it went to Cleve, their son."

There was no contradiction of the testimony of Mr. and Mrs. Dawes.

Cleveland Coddington died intestate February 13, 1920, leaving his widow, Ethel C. Coddington, and two small children, Mildred Coddington and Barrett C. Coddington, and a third child was born shortly after his death Madeline M. Coddington.

Ethel C. Coddington was appointed administratrix of the estate of Cleveland Coddington.

Louis Coddington, however, died October 3, 1921, leaving a will which was probated November 3, 1921. By this will he bequeathed what Liberty Bonds he owned at the time of his death

to two nephews, Harry Lewis Freeman and George B. Freeman. In addition to the five thousand dollars of Third Liberty Loan Bonds purchased with moneys received from his wife, he owned in his own right two thousand dollars of Fourth Liberty Loan Bonds.

The question is, whether the certificates and moneys referred to by Lottie A. Coddington in the talks with her husband in her lifetime, constitute a trust to be held during the lifetime of Louis Coddington, remainder to his son, Cleveland Coddington.

A valid trust in personal property may be created by parol and may be proven by the admission of the trustee, alone. **People v. Schaefer,** 266 Ill. 334; **Barnes v. Barnes** 292 Ill. 593; **Maher v. Aldrich,** 205 Ill. 242; **Price v. Laing** 152 Ill. 380; 1 Perry on Trusts, 6th ed. sec. 79; **Gilpatrick v. Glidden,** 81 Me. 137, 2 L. R. A. 622 and note; **Sweeney v. Tromble,** 224 Ill. App. 562.

A valid remainder may be created in durable personal property, after a life estate. **Dickinson v. Griggsville National Bank,** 209 Ill. 350; **Dean v. Northern Trust Co.** 266 Ill. 205; **Ward v. Caverly,** 276 Ill. 416; **McCall v. Lee** 120 Ill. 261.

While the statement made by Alice Dawes indicates

that the certificate of deposit for ten thousand dollars in the Peoples Bank of Atlanta may have been cashed in the lifetime of Lottie Coddington and Liberty Loan Bonds purchased with the proceeds thereof, yet the certificate of deposit in evidence shows that it was issued to said Lottie Coddington and made payable to her order, and that Lottie Coddington never endorsed this certificate and that it was endorsed by Louis Coddington and his son Cleveland Coddington, and stamped paid on the 9th day of May, 1918, nearly two months after the decease of said Lottie Coddington. The statements of A. L. Dawes and Alice Dawes, show that Cleveland Codding-

ton was willing that such a trust be entered into, and it is shown by their testimony that Mrs. Coddington told her husband that he might have the use of her money during his lifetime, and that at his death it should go to their son, Cleveland Coddington; but there is nothing in their testimony or in the entire record showing or tending to show that Mrs. Coddington turned over even the unindorsed certificate to her husband before she died. For aught that appears Mrs. Coddington retained possession of this instrument and her moneys until she died. The gift, therefore, if there was such, became merely ambulatory, and not being in writing and witnessed in conformity to the statute, is void.

The law requires that a trust shall be established by clear proof, and that no uncertainty shall exist either as to the subject or object of trust; that the act or acts constituting the trust must be consummated, and not remain incomplete or rest in mere intention. **Wright v. Buchanan,** 287 Ill. 468; **Lourie v. Sabath,** 208 Ill. 401; **Marlin v. Funk,** 75 N. Y. 134; **Boudreau v. Boudreau,** 45 Ill. 480.

From an imperfect gift a trust cannot be deduced. **Badgley v. Votrain,** 68 Ill. 25; **Williams v. Chamberlain,** 165 Ill. 210.

Proof of intention, however, positive, cannot change title to property. If from mistake of law, a party intending to create a trust fails to do those things which the law requires to carry his intention into effect, mere

proof of his intention, however positive, cannot change the title to the property. **Rothwell v. Taylor,** 303 Ill. 226; **Williams v. Chamberlain, supra.**

It is essential to the creation of a trust that the title to the trust property shall pass absolutely and irrevocably to the trustee, and that the settler of the trust part with all

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present and future dominion over the trust property, that the trust go into effect at once, not at some future time, and that there be a delivery of the trust property to the trustee, and that there be such a change of possession as to put it out of the power of the creator of the trust to re-possess himself of the trust property. **Telford v. Patton,** 144 Ill. 611; **Barnum v. Reed,** 136 Ill. 388; **Richardson v. Richardson,** 148 Ill. 563.

It will be seen that the testimony of A. L. Dawes and Alice Dawes is insufficient to establish a trust in this property, where the title and possession of the certificates and money was not turned over to the trustee, in pursuance of the intention of the donor in her lifetime, and the Circuit Court of Logan County was not in error in dismissing the bill for want of equity, and the decree of that court is affirmed.

Affirmed.

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General No. 7662 Agenda No. 68

October Term, A. D. 1923

Michael J. Murray, Appellant

235 I.A. 631

vs.

Farmers State Bank of Ashland, F. C. Wallbaum, et al
Appellees

Appeal from the Circuit Court of Cass County.

SHURTLEFF, J.

Appellant was cahsier of the Farmers State Bank of Ashland, for several years prior to January, 1921, and F. C. Wallbaum, one of the appellees, had been and remained its President. On November 13, 1920, appellant gave his promissory note to appellee bank for the principal sum of sixty-four hundred dollars, payable two years after date, with interest at six per cent per annum, after maturity.

At the same time, the President and Board of Directors of appellee bank, executed an instrument or "memorandum" in the following words and figures:

"Ashland, Illinois, Nov. 13, 1920

"It is hereby agreed and understood by the Board of Directors of Farmers State Bank, Ashland, Illinois, that they loan M. J. Murray, Ashland, Ill., the sum of Sixty-four hundred and no one hundredths dollars for the period of two years without interest; at the end of which period of years they are to vote whether M. J. Murray shall pay Farmers State Bank said principal sum without interest.

Board of Directors Farmers State Bank,
Ashland ,Illinois.
F. C. Wallbaum,
William Mau,
S. W. Dinwiddie,
Miles Kendall,
Elmer E. Johnson,
F. E. Virgin."

At the time said note was executed and delivered to the bank, a customer of the bank, one Max Hodes, had failed and became a bankrupt and proceedings for the adjustment of his estate were pending in the United States Court. Hodes was indebted to appellee bank upon notes in the sum of about twelve thousand dollars and a claim had been filed by the creditor bank with the Trustee of Hode's estate, from which it was hoped and expected to recover a portion or about half of the debt. Hodes had given appellee bank a note for sixty-four hundred dollars about a year previous to this time, and this note was about or just past due. Hodes had also, when he failed, an overdraft at appellee bank, amounting to about two thousand dollars, and appellee F. C. Wallbaum, having had some personal dealings with Hodes and shared in the profits of a single transaction, in which he realized a profit of something over two hundred dollars, paid by Hode's overdraft, to do which, Wallbaum borrowed one thousand dollars from appellant. Appellant claims that, at the time he gave the bank the note for sixty-four hundred dollars, he was not indebted to the bank in any sum whatever, but that Wallbaum, as President of the bank, requested appellant to make, execute and deliver to the bank appellant's note for sixty-four hundred dollars to become due two years after date, without interest, and that Wallbaum agreed to see to it that no claim would ever be made against appellant by the bank on account thereof; that Wallbaum desired the note solely that it might be placed among the papers, notes and securities of the bank and be in its possession, when examined by the auditor of public accounts. Appellant states that, desiring to aid and accommodate Wallbaum and the bank, he consented to and did make and deliver the note in question and that the President and Directors dictated, had prepared and de-

livered to him the memorandum set out. Appellant claims that when he executed the note, it was agreed by the President and Directors of the bank, that no claim should ever be made

upon appellant for the note and it was agreed and understood that the memorandum should show and state the entire transaction, and should recite that at or before the maturity of said note the bank and the members of the Board of Directors should vote to return the same to appellant. Appellant charges that by mistake and the use of ambiguous language, the reading of the memorandum was made to express a different contract from that agreed upon by the parties, and appellant in August, 1921, learning that the bank still held the note and was claiming that appellant was liable upon it and that appellee had threatened to sell and dispose of the note, filed his bill in equity to reform the memorandum, enjoin appellees from disposing of the note and to cancel the same.

Appellees answered the bill, denying all charges set out in the bill, and averring a good and valuable consideration for the note and denying that there was ever any understanding or agreement that appellant should not pay the note, and averring that in various meetings of the Board of Directors of appellee bank, concerning the Hodes indebtedness, said Board and the President charged appellant with responsibility for making the loans to Hodes, the greater part of which were without authority from the Board of Directors and also charged appellant with being interested, with said Hodes, in the business of the latter, and that he was responsible to said Bank for any loss incurred upon said note; and the answer avers that because of said charges and in compromise thereof, appellant gave the note in question.

There was a supplemental bill filed January 8, 1923, by appellee, Farmers State Bank, against said appellant, averring that the note

was past due and unpaid and a prayer for a decree to cover the amount of the note. There was an answer to this supplemental bill and a replication. The original bill, answer and replication were referred to the Master upon October 10, 1921, and later the supplemental bill, answer, etc., were referred to the

Master.

On the hearing before the Master on June 2, 1922, appellant produced and identified a written agreement, purporting to have been signed by F. C. Wallbaum, President of appellee bank, which agreement was in the following words and figures:

"October 31, 1920.

"I hereby personally guarantee to M. J. Murray the return of his note for sixty-four hundred and no 100 dollars, without any cost to him, and which I asked him to sign for the purpose of replacing note of Max Hodes to Farmers State Bank, Ashland, Ill., for like amount, and which note of Max Hodes would otherwise be required by the Auditor to be charged off as loss.

"This guarantee is made in duplicate, and I reserve the original for my files.

F. C. Wallbaum."

At this time appellant had put in his testimony in chief and appellees had put in their proof. Appellant had testified that when the note in question was given, he had prepared a written agreement, absolving himself from liability, but that the President and Board of Directors had refused to sign it and then the paper was prepared—that he had "typed it," which the President and Directors had signed and which is heretofore shown. Appellant testified on June 2, 1922, that the agreement signed by F. C. Wallbaum October 31, 1920, was signed on the day it bears date in the Directors room in the bank in Ashland, "along toward dark, after the close of banking hours and that it was signed at the same time it was written; that it was written in duplicate and that Wallbaum kept the original." The document produced appears to be written on thin copying or

carbon paper. On January 8, 1923, after the close of the testimony on the other bills, appellee F. C. Wallbaum presented his cross bill against appellant, averring that the signature to the document last produced by appellant was not his signature and that he never authorized the same, and prayed

that the instrument be cancelled. This cross bill was answered and there was replication and reference to the Master and each side presented the testimony of numerous witnesses as to the genuineness of appellee Wall baum's signature to said instrument.

There was a report and finding by the Master in favor of appellees and the chancellor overruled exceptions to said report and a decree was entered, dismissing appellant's original bill for want of equity, a decree was entered that appellee bank recover the amount of said note and interest after maturity from appellant, and the writing purporting to have been signed by F. C. Wallbaum on October 31, 1920, was, by the decree, cancelled. Appellant has brought the case to this court by appeal.

In this case, the Court is not bound by the rule that the finding of the chancellor will not be disturbed, unless it is clearly and manifestly against the weight of the evidence, as none of the evidence was taken in open court. **Larson v. Glos.** 235 Ill. 584; **Oliver v. Ross,** 289 Ill. 637. We have very carefully examined the entire record in this case. Appellant assigns error and insists that, at the time the note was given, he was not indebted, in any amount, to appellee bank and that the purported surrender of a claim, which is entirely without foundation, does not afford a sufficient consideration for a compromise, quoting 12 Corpus Juris 327; **Heaps v. Dunham,** 95 Ill. 583; **Good v. Kranse,** 215 Ill. App. 333; **Mulholland v. Bartlett,** 74 Ill. 58 and other cases, and

appellant further insists that a claim of liability for the pre-existing debt of another, would, unless evidenced by a writing meeting the requirements of the Statute of Frauds, be without foundation in law or equity and not a sufficient consideration for a compromise, quoting **Denton v. Jackson,** 106 Ill. 433.

These principals of law would be correct in a case where they were applicable to the facts; but in this case it was claimed and alleged that appellant was interest-

ed with Hodes in the said business and liable for the whole debt. Testimony was offered by appellees, tending to show a partnership between Hodes and appellant.

We cite some of the testimony submitted, tending to show appellant's interest in Hode's business. For some five years previous to the giving by appellant of the note in question, Max Hodes, a junk dealer doing business at Ashland, Taylorville, Decatur and Danville, had been a customer of the bank, having, at times, four different accounts under the names—"Max Hodes," "Max Hodes—Decatur account," "Max Hodes—Danville account," and "Max Hodes—Taylorville account." When checks came in not identified as to a particular account, appellant told the bank employees against what account to charge them. If a check overdrew the Hodes account, appellant Murray would put in the money to cover it, and appellant sometimes deposited to his own credit the proceeds of junk sold by Hodes. Appellant also kept Hode's books and was in the habit of holding conferences with Hodes in the back room of the bank. Appellant referred to the Decatur plant as "our plant;" checks were cashed signed "Max Hodes, per M. J. Murray." In August 1919, Hodes told the assistant cashier, Fitzgerald, that he was a copartner with Murray. Hodes told the

same thing to the President, F. C. Wallbaum, and to Director William Mau and appellant did not deny it. In September, 1920, Hodes, being unable to find appellant, borrowed two thousand dollars from F. C. Wallbaum for use in a business venture and when making repayment, less than two months thereafter, instead of paying interest, insisted upon paying $255.00 as one-half of the profits on the venture, saying: "I always split it." Upon learning of this transaction, appellant told assistant cashiers Fitzgerald and Raymond Mau that whenever he had a good thing Wallbaum always butted in.

At a meeting of the Board of Directors in December, 1919, the matter of Hode's loans came up for discussion, including the matter of a note for a new advancement of sixty-four hundred dollars to Hodes on November 12,

1919, and Director Ernest Wallbaum, in the presence of Murray objected to the approval of the loans, and Director William Mau said that the Hodes loan was all right because "Murray is a partner." Murray was silent and made no denial; and with the officers of the bank it was generally understood that the Hodes loans were secured by the fact that Murray was a partner.

In the early part of September, 1920, Hodes was adjudged a bankrupt. The notice of adjudication mailed to the bank was opened by Assistant Cashier Fitzgerald, who handed it to appellant saying: "Wasn't you a partner of his?" Murray replied: "No, I sold out." At his examination before the referee, the bankrupt testified that Murray was his partner and received half the profits of the Taylorville plant. A transcript of this testimony was offered in evidence by appellant in this case. Before reading the transcript, counsel for appellee's objected to it, but on read-

ing it withdrew the objection, and later the then counsel for appellant attempted to withdraw the offer of the transcript.

Appellant drove out to the residence of the President F. C. Wallbaum, who lived in the country, and informed him of Hodes bankruptcy, and the President told appellant Murray that the brunt of the proposition was up to him; that the directors approved the loans depending on appellant's liability.

At the time of Hode's failure, appellant Murray was in possession of two trucks then worth twelve hundred dollars, used by Hodes in the junk business. He offered to let F. C. Wallbaum have one of the trucks but made no explanation to any of the bank officers as to how he came into possession of the property.

At a regular meeting of the Board of Directors, held on November 6, 1920, the Hodes failure was discussed. The Directors told Murray that as a partner of Hodes they expected him to make good the whole loss, and asked him if he had any proposition to make. According to the Directors testimony, appellant did not deny liability

but said he was not able to pay it, and offered to give his note for sixty-four hundred dollars, which, he said, with the dividends from the bankrupt's estate, would take care of the bank's loans.

Another meeting of the Board of Directors was held November 13th when the note here in question was given. Murray's liability was again discussed, and the Directors asked him to make good for at least ten thousand dollars. He again said he would give his note for sixty-four hundred dollars, but wanted the Directors to sign a contract; which he presented, and they refused to sign.

Some testimony, certainly, was offered tending to show that appellant was a partner of Hodes, or was interested in his busi-

ness, and had led the bank to believe that appellant's own credit was involved in Hode's business.

Compromise of a disputed claim, particularly when arising from disputed facts, is a good consideration, although the demand may be unenforcible. If the claim is asserted in good faith, a compromise thereof is a good consideration, although the claim could not have been legally enforced either at law or in equity. In such case the courts will not inquire into the merits of the controversy. **Dougherty v. Duckles,** 303 Ill. 490; **Walker v. Shepherd,** 210 Ill. 100; **Honeyman v. Jarvis,** 79 Ill. 318; **Miller v. Hawkes,** 66 Ill. 185; **Knotts v. Preble,** 50 Ill. 226; **Pyle v. Murphy,** 180 Ill. App. 18; Corpus Juris, p. 342.

Where a promise is given for a consideration moving to the promisor, the statute does not apply, even though the promise is in form to pay the debt of another. **Borschsenious v. Conutson,** 100 Ill. 93; **Power v. Rankin,** 114 Ill. 52; **Bunting v. Darbyshire,** 75 Ill. 408; **Eddy v. Roberts,** 17 Ill. 508.

Some objection is made by appellant that the averments in appellee's answer to the original bill are not sufficiently broad to allege a partnership, or such an interest by appellant in Hode's business, as would render appellant liable for Hode's debts. We have examined the record as to these averments and find that appellees

do charge and aver that at the meetings of the President and Directors of said bank, with appellant, at the time said compromise and settlement was alleged to have been made, appellees did charge appellant with making loans to said Hodes, without the authority of said Board of Directors and also charged him with being interested in the said business of Hodes and by reason of such matters being responsible to the

bank. We assume the answer avers just what took place at the bank. We do not consider, under the authorities, that it was then necessary for appellees to precisely state and define their claim. Neither is it necessary, in the proof, to establish a partnership. If there were disputed rights and claims of any nature asserted in good faith, and having a foundation in law, and a settlement and compromise was effected, the courts will not inquire into the controversy, even though such claims could not have been enforced, either at law or in equity.

As to the merits of appellant's contention that the note in question was executed upon the agreement that appellant should never be called upon to pay the note, apepllant so testified, but he is contradicated by the President and all of the Directors of the bank save one, who was ill and not able to attend the meeting. In this respect, the proof is so overwhelming that there is no occasion for discussion. The only circumstances in the case at all corroborative of appellant's theory, is the clause in the memorandum signed by the President and Directors at the time the note was executed, in which it is stated: "At the end of which period of years they are to vote whether M. J. Murray shall pay Farmers State Bank said principal sum, without interest—" and the agreement purporting to have been signed by F. C. Wallbaum on October 31, 1920. As to the clause in the memorandum, a claim had been filed against the estate of Max Hodes for the entire debt—twelve thousand dollars. It was uncertain just what dividend would be paid upon this claim. Should that dividend exceed fifty-six

hundred dollars, the surplus, by right, should have been indorsed upon appellant's note. The clause in the memorandum

indicates some contingency or unsettled matter that may apply to the note. It does not in any manner indicate that appellant was not to be liable on the note. Appellant had drawn a paper which would have that effect, but the directors had refused to sign it. This refutes absolutely any mistake or ambiguous language in the paper drawn.

We now come to the pretended agreement of October 31, 1920, bearing the purported signature of F. C. Wallbaum. At this time Wallbaum had property of the value of seventy-five or eighty thousand dollars. He was a prosperous farmer and held about ten thousand dollars stock in appellee bank. It is very strange that appellant, holding this guarantee from Wallbaum, two weeks before the note in question was executed or determined upon in amount, should be so exercised to obtain further guarantees from the bank and its directors. It could only be explained upon the theory that appellant and Wallbaum were cooperating to unload the loss upon the bank, and appellant's testimony as to what took place in the back room of the bank before the note was given, refutes that imputation. Both sides submitted their proofs before the paper was brought in. It was written on thin paper used for carbon copies and while its contents meant protection to appellant to the amount of sixty-four hundred dollars, yet appellant permits Wallbaum to retain the original and appellant has only a "tissue," "suspicious" document to protect his right. If it was anything, it was Wallbaum's guaranty and Wallbaum did not require and should not have retained the original instrument. We have examined the testimony of the witnesses bearing upon the genuineness of this signature. About an equal number on each side testified. Appellee Wallbaum presented the testimony of one expert and several, occupying bank

positions, where the witness was trained to detect variations in signatures, if such occurred, and these witnesses pointed out peculiarities in the signature and some of its letters that appeared in some of Wallbaum's genuine signatures. On the other hand, appellant's witnesses tended more to persons who had had less experience in this line, some who had received Wallbaum's check two or three times a year, and some of these witnesses testified with a lack of positiveness and merely said it looked like Wallbaum's signature. Fitzgerald, the assistant cashier of appellee bank, testified that the signature was F. C. Wallbaum's. On the whole testimony, it is the opinion of this court that appellee Wallbaum supported his cross bill by a preponderance of the evidence. Appellant contends that the falsity of this pretended signature, under the rule, should have been proven by appellee beyond a reasonable doubt, quoting **McInturff v. Insurance Co.** 248 Ill. 92 and **Oliver v. Ross,** 289 Ill. 639.

Appellee's cross bill first charged that the instrument was forged and fictitious. Later ,the cross bill was amended by appellee, on leave of court, and the charge of forgery eliminated and the bill made to charge merely that the signature was not that of appellee, nor by his authority. Under this allegation, the fact could be established by a preponderance of the evidence. **Dunbar v. American Teleg. Co.** 238 Ill. 472; **People v. Flannery,** 225 Ill. 70; **Grimes v. Hilary,** 150 Ill. 144; **Burgiel v. Aniol** 218 Ill. App. 469.

In **People v. Flannery, supra,** the court held (p. 70); "But counsel doubtless intend to insist upon the rule that when a criminal offense is charged in a civil suit it must be established by the same degree of proof required in criminal cases.

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The rule, however, is confined to cases in which the criminal charge is made in the pleadings as the foundation for the civil action. In heretofore discussing the rule we said that even in those courts where the more rigid rule obtains, it is held to apply only to cases where the charge of criminality is made in the pleadings.

(**Sinclair v. Jackson,** 47 Me. 102; **Schmidt v. New York Mutual Fire Ins. Co.** 1 Gray 529.) The counsel for appellants cite no authority extending the rule beyond this class of cases, and we are not disposed to carry it further."

Finding no error in the record, the decree of the Circuit Court of Cass County is affirmed.

Affirmed.

General No. 7673 Agenda No. 44

October Term, A. D. 1923

John Lapshansky, Administrator of the Estate of Anna Lapshansky, Deceased, Appellee

vs.

Cleveland, Cincinnati, Chicago & St. Louis Railway Co., a Corporation, Appellant

Appeal from the Circuit Court of Montgomery County.

SHURTLEFF, J.

Appellee, as administrator of the estate of Anna Lapshansky, his wife, brought suit against appellant, for injuries causing her death. The declaration contained three counts, the first two of which were based upon the negligence of the appellant and the third count alleged that there was a certain traveled way in said village used by the public as a crossing for pedestrians over and across both the main tracks, and side tracks of appellant's railway, in the easterly and densely populated portion of the City of Nokomis, where the accident in question occurred. It was alleged that said traveled way or path was used by a great many persons, in crossing the tracks of appellant's railway, in going to their homes. South of said tracks, to and from a north switch track, where such persons and others were taken on and let off as passengers, for hire by appellant, to be conveyed to and from said points to the village of Wenonah. Many of the persons using this path were miners, living in Nokomis, but working at Wenonah and were transported by appellant, and it was alleged that for several years the said path had been used by others, in crossing from the south to the north part of Nokomis, all of which was well known, or, by the

exercise of reasonable care, could have been known to appellant, its agents and servants, in charge of its engineers and trains. The third count of the declaration charges that appellant willfully, wantonly and recklessly ran its east bound train within the said city limits

of Nokomis, at a dangerous and unreasonable rate of speed, of more than fifty miles per hour, and willfully and wantonly struck and injured appellee's intestate, at this pathway, from which injuries she died.

Upon the trial, at the close of appellee's testimony, there was an instruction and verdict, finding appellant not guilty upon the first two counts and the case went to the jury upon the third count of the declaration only, and appellant's plea of not guilty.

There was a verdict and judgment in favor of appellee in the sum of five thousand dollars, to reverse which, the case is brought to this court on appeal.

Appellant contends that the court below should have directed a verdict, at the close of plaintiff's case, and again at the close of all the evidence, in favor of appellant, as requested by proper motions and instructions offered on the trial. It is insisted that the evidence submitted by appellee did not warrant the court in submitting the issue of fact, raised by said third count, to the jury. This involves a consideration of the proofs submitted by appellee and in the entire record.

According to the undisputed testimony, the accident occurred at a point some three or four blocks east of Elm Street in the City of Nokomis. The railway of appellant runs northeasterly and southwesterly through this city, on its St. Louis and Mattoon line. It is a double track railway, with side tracks on either side at the point of injury. The southerly main track is the east bound

and the northerly main track is the west bound. There is a passing track south of the southerly main and a switch track north of the northerly main track.

At the time of the accident a freight train was going west on the northerly track and a passenger train traveling at a rate of about fifty miles per hour, going east on the southerly main track.

Appellee's intestate, who lived in the southeasterly part of Nokomis, left her home in the afternoon of February 21, 1921, and started towards the track of appellant company. Before reaching them, she met her

daughter and another child returning from school and stopped and talked with them. After leaving the children, she approached the tracks of the railway, from the south, at the time the freight train was going west. She stopped and waited for the freight train to pass, some of the witnesses stating that she was upon the south main track, others testifying that she was just south of the south rail of the east bound tracks and about at the end of the ties, when the east bound passenger train going east, saw appellee's intestate, when he passed Elm Street. He estimates the distance at one thousand feet to where she stood (looking northeast towards the passing freight train, as stated by some of the other witnesses). He states that she was standing about there feet south of the south rail o fthe east main tracks, when he first saw her at Elm Street, and that she remained in the same position and made no move, until the engine was within fifty or seventy-five feet from her, when she took a step forward, just as the caboose of the freight was passing westwardly, and was struck. It was a clear, sunshiny day and the engineer and firemen both had a clear veiw of appellee's intestate from the time their train passed Elm

Street, and saw her until she was struck. The engineer further testified that when he first saw her, she was "in the clear" and evidently meaning that she was at a safe distance from the rail, but his measurements were three to three and a half feet south of the south rail and regardless of his testimony later, of his lack of knowledge of distances, the jury had a right to take the measurements he had given, together with all the other evidence in the case.

Appellant's contention was, that if appellee's intestate had remained standing where she was when the passenger train was at Elm Street, she would not have been injured, and that it was the step or two forward by appellee's intestate which the engineer could not anticipate, which resulted in the injury. The injury occurred at the place where the path or way crossed appellant's

right of way, over the tracks.

It was shown that it was impossible to stop said passenger train, running at fifty to fifty-two miles per hour, in less than five hundred feet, and the train in question was brought to a stop in about five hundred feet from this injury. Appellant showed by proofs that the proper station whistle and crossing whistles had been blown, Elm Street being the last crossing before the scene of the accident and the proofs showed that the automatic bell was ringing all through the City of Nokomis.

It was shown that the freight train going west was running at about twenty-five miles per hour, making a grating and harsh sound and more or less smoke was coming from the freight train nearly eastward, which may have confused appellee's intestate, but it in no manner affected a vision of her from the engine of

the passenger train. The engineer testified they were probably ten or twelve seconds in running from Elm Street to the scene of this accident, and that upon appellee's intestate taking the "step or two" forward, he at once turned off the steam and applied the emergency brakes, but that at that time it was a physical impossibility to avoid striking her.

We have not recounted all of the testimony. We have stated the principal facts testified to by witnesses to be taken into consideration on determining the assignment of error in question. There was testimony that appellee's intestate was standing in the south passing track and by some of appellee's witnesses, that she was standing in the center of the east bound main track. There is ample testimony in the record that appellee's intestate was standing over the south rail of the east bound main track, upon which appellant's passenger train was traveling eastward, at about the end of the ties, and not over three to three and a half feet from the south rail, looking at a freight train going west, and apparently waiting for a chance to cross, all of which facts and the situation was fully presented to the engineer at Elm Street, and fully within his view for ten or twelve sec-

onds, while traveling one thousand feet, if the jury saw reason to believe competent testimony that was presented to them. In this case, it was shown that the alarm whistle was blown, after passing Elm Street and the engineer was in a position to see and know of the rumble and grating of the freight train and that the warning signals of his engine had not been observed by the woman. The fireman on this engine, (evidently stationed in the left of the cab) had seen a lady on the track. He states that she was standing in the south

passing

track, all the time that he observed her and that she had made no motion, up to the time she passed out of view from his side of the cab. The fireman states that, "one cannot see around in front of the engine, after one gets close to an object; one can see up to within forty or fifty feet of the front of the engine, but one's vision is cut off; one can see the right side until you get within fifty feet or something like that."

The fireman further testifies that the distance from the east bound main to the passing track "is somewhere about seven feet in the clearance of a train on the main track.

The fireman also watched appellee's intestate, upon the tracks until she passed out of his view from the left hand side of the cab. At this time, according to the testimony, appellant's passenger train was traveling at the rate of seventy-three feet per second. If appellee's intestate at that time or immediately after passing out of the fireman's view, had started toward the east bound main track at the rate of three miles per hour, she could only have traveled four and one-third feet, and would still be three and two-thirds feet, at least, south of the south rail of the east main track, and could not have been struck by the front part of the engine, as testified to by the witnesses. Nothing in the record indicates but that the witnesses are all endeavoring to state the facts, as they saw and observed them, to the best of their recollection, and there are only those variations which usually

occur, in the different views presented to the various witnesses, and their recollection of the same; but when the testimony of the fireman is analyzed, it is found to very much corroborate the testimony of the engineer as to the distance appellee's

intestate was standing from said south rail and the testimony of those witnesses, who stated that she was near or at the end of the ties of that track. In this case it is undisputed that at this point there was a way or path, used upon and over appellant's right of way, not only by many miners living in the southeast part of Nokomis, going to and from their work at Wenonah, and boarding appellant's train for transportation, at the north side of this path or way; but it had been used by many other persons in Nokomis, in going from the south to the north side of the town and **vise versa,** the first street crossing west being at Elm Street, three blocks away. Appellant's railway makes a stop at the north side of this pathway to pick up passengers, and the path was much used by school children from the north going to the school on the south side of appellant's track, all of which was well known to appellant and had been so in use for many years. Under all these facts and circumstances in evidence, the court is asked to say as a matter of law, that there was no evidence in the record fairly tending to show that the appellant, by its servant willfully and wantonly, struck appellee's intestate.

It was held in **Jeneary v. C. & I. Traction Co.,** 306 Ill. page 397: "Ill-will is not a necessary element of a wanton act. To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious

indifference to consequence, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care with the consequence of a willful injury. **Walldren Express Co. v. Krug,** 291 Ill. 472; **Bernier v. Illinois Central Railroad Co.** 296 id. 464.)

Appellant owed a duty to appellee's intestate to keep a look out for persons upon its track at the point in question. It was held in **Bernier v. Illinois Central R. R. Co.** 296 Ill. at page 471: "Where a railroad company has permitted the public to travel over its track for a considerable period of time and a considerable number of people have availed themselves of such use, the railroad company must keep a lookout for persons on its track." **(Jay v. Chicago, Burlington and Quincy Railroad Co.** 263 Ill. 465.)"

It is objected by appellant that what was said in the last case cited was not necessary for a decision of the case and was **obiter dictum.** That may be true, but the court applies the rule in **Bernier v. Illinois Central R. R. Co., supra,** where it is applicable and it seems to be a rule of general application, where facts are presented similar to the facts in this case. **Smith's Administrator v. Cincinnati, New Orleans and Texas Pacific Railway Co. et al,** 146 Ky. 568-41 L. R. A. (N. S.) 193. It was further held in **Bernier v. Illinois Central R. R. Co. supra,** on page 471: "Six feet between two passing trains is a rather narrow space to be designated as a zone of safety. It is common knowledge that more or less suction is created by a moving train, which is especially dangerous to women owing to the nature of their clothing, and it is not uncommon to hear of accidents caused by projections from moving trains, such as the one that resulted

in the serious injury in **Curran v. Chicago and Western Indiana Railroad Co.** 289 Ill. 111."

Both the engineer and the fireman in this case had observed appellee's intestate from Elm Street, one thousand feet away. They knew of the noise and smoke and grating of the freight train going west. They could see, traveling a distance of five hundred feet, during a period

of five seconds of time, that appellee's intestate had paid no attention to their signals and warnings but was still watching the freight train, and they must have known, if she was on or very close to the east bound track, that it was her purpose to cross to the north and in the rear of the freight which was about to clear the "pathway" upon which appellee's intestate was then standing. The question of a willful and wanton injury in this case all depends upon the proximity to the east bound track of appellee's intestate. Appellant argues in its brief that, "at the time the engineer first saw her and up to the time the train was only fifty to seventy-five feet from her, she was at least 8.5 feet from the nearest rail of the main track." If this were true, we should have no hesitation in holding that there was not any substantial evidence in this case to show a willful and wanton injury. But we have seen that appellee's intestate could not have been any such distance from the track. If such had been the case, she would have walked into a moving coach and not in front of the engine. If appellee's intestate was standing within three or three and a half feet from the south rail or at the end of the tie and remained there in a motionless position, watching the freight train pass and apparently waiting, to pass in its rear, and giving no sign of heed or knowledge of

the whistles and alarms signals of appellant's passenger engine, and if appellant's servants in charge of said train knew of her presence and heedlessness, and apparent ignorance of the approach of the passenger train and so viewed the situation and had knowledge of her apparent danger and of her ignorance of the situation, then it is for the jury to say, under the law, whether the injury, when it happens, is willful and wanton. The testimony of the engineer that she was "in the clear," is a mere conclusion. That is the question the jury must determine from measurements, facts and circumstances in evidence. The question of willfulness and wantonness is peculiarly a question for the jury and in determining that question they have the right to

and should consider all the surrounding circumstances. It has been held that whether certain acts constitute willful negligence is a question of fact for the jury. **Voorhies v. Chicago and Alton Railroad Co.** 215 Ill. App. 531; **Heidenreich v. Bremner,** 260 Ill. 439; **Illinois Central Railroad Co. v. Leiner,** 202 Ill. 624; **Chicago B. & Q. R. Co. v. Murowski,** 179 Ill. 77.

Under the evidence, as submitted in this case, this court cannot say as a matter of law, that there is no substantial evidence in the record to support appellee's third count and the assignment of error is overruled

Some criticism is made of the court's rulings on the admission of testimony, but upon a careful examination of the record, it appears that in nearly every case the objection was made as to form of questions, which was properly sustained, and no substantial rights of appellant were prejudiced thereby.

Appellant assigns error upon the giving of appellee's sixth and eighth instructions as to the duty of appellant in the premises.

Instructions number six is based upon the situation as to the path or way over the tracks and presents to the jury, in case the jury find that said path or way had been used for a great length of time, with the knowledge and consent of appellant, then the jury are instructed, "that it was the duty of the defendant to operate its train with due care and caution at said place for the safety of travelers and to the plaintiff's intestate in this case."

Instruction number eight, in another form, predicated upon another statement of the use of the way and appellant's knowledge and consent thereto, informed the jury that:

"The defendant owed to such persons so crossing said path or traveled way the duty of exercising due care and caution for the safety of said persons, regardless of whether they were traveling on a regular laid out street or public highway."

Appellant strenuously insists that the giving of these

instructions was error, and that if these instructions were to be given, an instruction also should be given as to the care and caution required of appellee's intestate. The case was tried and the jury instructed solely upon the third count, for a willful and wanton injury and the jury had been told to dismiss from their minds any and all consideration of the question of contributory negligence on the part of the deceased. The jury were properly instructed as to what constituted a willful and wanton injury by appellant's fifth instruction, and by other instructions for appellant the jury were repeatedly informed that they could not find the defendant guilty, unless they found from the evidence that the defendant failed to exercise reasonable care for the safety of plaintiff's intestate, after it was discovered by those in operation of the train that she was in a place of danger.

Appellant also submitted and the court gave its instruction number thirteen as follows: "The court instructs the jury that if the evidence in this case shows that the injury complained of happened on the ground of right of way used and occupied by the defendant, and that the plaintiff's intestate had no right to be where she was, then the defendant was not answerable for the injury unless it was done willfully, because the defendant, in the use of its road, is not bound to keep a lookout on its own ground as against those having no lawful right on the road, but may use the same for its own purposes, in its own way, and any person going on its track without permission, at such place, is there at his own peril and in his own wrong, and therefore if he is injured he cannot recover, because his own neglect or carelessness have contributed thereto, unless the jury believe from the evidence that the defendant was guilty of gross negligence and willfully injured the plaintiff's intestate."

Appellant's instruction thirteen, not based upon the evidence, was very misleading, and advised the jury that if the evidence shows that plaintiff's intestate had no right to be where she was, then the defendant in the use of its road, was not bound to keep a lookout on its own

ground and in fact owed no duty to plaintiff's intestate, except not to willfully and wantonly injure her. In other words, appellant and appellee each submitted instructions, which were given, appellant as to the duty owing to plaintiff's intestate, in case there was no way or path over the right of way at the point of injury, and appellee as to the duty of appellant, in case such way or path was in use, which was not disputed. As stated in **Bernier v. Illinois Central R. R. Co.**

page 474, where the only issue was as to a willful and wanton injury, instructions as to contributory negligence were inconsistent with the other instructions and the court said: "But the inconsistent instructions were given at the request of the plaintiff in error, and it cannot now complain of error which it led the court to commit. **Snyder v. Snyder,** 152 Ill. 60 id; **Consolidated Coal Co. v. Haenni,** 146 id. 614; **Illinois Central R. R. Co. v. Harris,** 162 id. 200."

Appellant's instruction thirteen covers fully the subject of contributory neigligence and states, "because his own neglect or carelessness have contributed thereto," etc, where one is injured on the grounds of a railway, where they are not entitled to be, and appellee's instructions merely state the duty of the railway, to one on its premises, where she is entitled to be. Neither of these instructions should have been given in this case, but when appellant submitted and the court gave its instruction number thirteen, it was not error in this case to give appellee's instructions six and eight. Where both parties have joined in submitting an immaterial issue, the error should not reverse.

Appellant assigns error on the giving of appellee's eleventh and twelfth instructions as to damages and the method of arriving at the amount. Number eleven is as follows: "If from the evidence in the case and under the instructions of the Court the jury find the issue for the plaintiff, and that the plaintiff has sustained damages, as charged in the declaration, then to enable the

jury to estimate the amount of such damages it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate

form the facts and circumstances proven by the evidence and by considering them in connection with their knowledge, observation and experience in the business affairs of life."

And number twelve reads as follows: "If you find the defendant guilty under the evidence and the instructions of the Court, then it is your duty to assess the plaintiff's damages, and in assessing the damages you have a right to take into consideration all of the testimony, and that only bearing upon that question and allow such damages, if any, as you may deem a fair and just compensation with reference to the pecuniary loss resulting from the death of the plaintiff's intestate to her next of kin; and in estimating the plaintiff's damages you have a right to take into consideration whatever you may believe from the evidence the next of kin might have reasonably expected in a pecuniary way from the continued life of the intestate."

Instruction number eleven has been severely criticised in **Fowler v. C. & E. I. R. R. Co.,** 234 Ill. 625, citing **Illinois Central Railroad Company v. Johnson,** 221 Ill. 42, and many cases there cited. In **Illinois Central Railroad Company v. Johnson, supra,** it was held, page 49: "Under the instruction authorizing the jury to assess the plaintiff's damages at such reasonable sum as she might be entitled to recover under all the facts and circumstances proved in the case, not exceeding $5000, the jury went to the limit and returned a verdict for that sum. In the case of **Muren Coal and Ice Co. v. Howell,** 204 Ill. 515, the trial court instructed the jury that if they found the defendant guilty it would be their duty to assess the plaintiff's damages, and gave the following direction: 'And in doing so you may take into consideration

the pecuniary injuries resulting to the widow and next of kin, if, from the evidence, you believe there is a widow and next of kin, and that they have suffered pecuniary injury or loss on account of the death of said August Schmidt, and give to the plaintiff such a sum as in your judgment will fairly compensate the widow and next of kin for such pecuniary injury or loss, not to exceed, however ,the amount sued for in this case.' It was held that the instruction was erroneous, and for that error the judgment was reversed. The court reviewed the previous decisions where it was considered that such an instruction did not limit the jury to the acutal pecuniary damages sustained as established by the evidence, but left them free to give such sum as in their opinions of right or wrong would fairly compensate the widow and next of kin for the pecuniary injury or loss. The instruction in this case is much more objectionable than the one in that case, as it does not even limit the jury to estimating the compensation for pecuniary injury or loss, but authorizes the jury to assess the plaintiff's damages at such reasonable sum as in their judgment she may be entitled to recover. It refers to the facts and circumstances proved in the case, which were the facts and circumstances already detailed. It did not require that the assessment should be based on the evidence as to damages for which the law allows a recovery, but authorized the jury to give such damages as in their opinion plaintiff ought to have under all the facts and circumstances."

But in Carney v. Marquette Coal Mining Co. 260 Ill. page 226, the court held: "The objection made to these instructions is, that they authorized the jury to consider all the facts and circumstances in evidence in determining the amount of defendant in error's damages. These instructions are open to the criticism

that they authorize the jury, in determining the amount of damages in case they find for defendant in error, to consider all the facts and circumstances of the case. Strictly speaking, the instructions should have limited the jury to a consideration

of the evidence as to the damages, and not have authorized them to consider all of the facts and circumstances of the case. Instructions of this character have been condemned by this court. (**Muren Coal and Ice Co. v. Howell,** 204 Ill. 515; **Illinois Central Railroad Co. v. Johnson,** 221 id. 42.) But in the case at bar we do not see how the instructions complained of could have led the jury to consider any improper fact or circumstance in the record in connection with the amount of damages. In addition to the general language referred to, instruction No. 8, advised the jury what they might consider in determining the amount of damages. As intelligent men the jurors would understand the general language, "all the facts and circumstances in evidence," to refer to all the facts and circumstances in evidence in connection with the particular elements of damages enumerated in the instruction."

Later, in **Hopkins v. Whelan,** 217 Ill. App. 248, Mr. Justice Dibell made an examination of the authorities and said, page 250: "The fifth instruction, given at the request of plaintiff, told the jury that if they found certain things therein specified, they should find the defendant guilty and assess such damages 'as you shall believe the plaintiff to be entitled to from the evidence in this case.' This instruction has been many times condemned where plaintiff was not entitled to punitive damages, because it not only would authorize punitive damages if the jury thought plaintiff was entitled thereto, but also would turn the jury loose

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to determine for what damages should be awarded, without any guide from the court. We collected the earlier authorities against such an instruction in **La Porte v. Wallace,** 89 Ill. App. 517. It had since been condemned by the Supreme Court in **Muren Coal & Ice Co. v. Howell,** 204 Ill. 515; **Illinois Cent. R. Co. v. Johnson,** 221 Ill. 42 and **Fowler v. Chicago & E. I. R. Co.** 234 Ill. 619. It has been condemned by Appellate Courts of the different districts in **Galesburg Elc. Motor & Power Co. v. Barlow,** 98 Ill. App. 334; **Malott v. Woods,** 109 Ill.

App. 512; **Chicago, B. & Q. R. Co. v. Kuck,** 112 Ill. App. 620; **Central Ry. Co. v. Ankiewicz,** 115 Ill. App. 380; **Illinois Cent. R. Co. v. Becker,** 119 Ill. App. 221; and **Boggs v. Iowa Cent. Ry. Co.** 187 Ill. App. 621. In other cases it has been held that where another instruction laid down the true rule of compensation, such other instruction might cure the error in a proper case. **Springfield Consol. Ry. Co. v. Puntenney,** 200 Ill. 9; **Illinois Terminal R. Co. v. Thompson,** 219 Ill. 226; **Fitzgerald v. Benner,** 219 Ill. 485. In this case the seventh instruction, given at the request of plaintiff, directed the jury under the case stated to award fair compensation to plaintiff. Therefore, under the authorities last cited, if the case is otherwise satisfactory, the error may have been cured."

Further, in this case, the form of the instruction is approved, where the damages to be estimated all pertain to pain and suffering and no bills or charges for doctors, nurses and hospitals are to be taken into consideration. Turning to the instructions eleven and twelve, it may be conceded that number eleven is subject to the criticism appellant urges. Instruction number twelve, however, is fairly free from error. Appellant's only criticism of this instruction is that in its language stating that, "the jury have

a right to take into consideration whatever you may believe from the evidence the next of kin might have reasonably expected in a pecuniary way from the continued life of the intestate," is open to the criticism that the jury may infer that this is only one of the matters that the jury may take into consideration in arriving at the damages, and therefore error, but the instruction confines the jury, in language fairly plain by its terms, to testimony bearing only upon the question of damages and is not an erroneous instruction and under the authority of **Springfield Consol. Ry. Co. v. Puntenney, supra; Illinois Terminal R. Co. v. Thompson, supra; Fitzgerald v. Benner, supra,** cured the error in the eleventh instruction.

The jury were fairly instructed in this case. They were instructed that in case they found that the plaintiff

was not entitled to recover, they would have no occasion to consider the question of damages. The jury were instructed that the instructions were to constitute one connected body or series and should be so regarded by them.

The appellee's intestate was a young woman about twenty-two years of age and in good health and had a husband and three small children. There is nothing about the verdict that would indicate that the jury were misled or confused, or in any manner went outside of the evidence in making up their estimate of the damages. In its amount, it neither shocks the conscience, nor is it exorbitant, if the jury believed from all the evidence in this case that appellant was liable.

Appellant makes some criticism of instructions, asked for by appellant and refused by the court. We have examined all of these

instructions and find that the substance of all proper instructions was included in the instructions as given.

Finding no error in this record to warrant a reversal, the judgment of the Circuit Court of Montgomery County is affirmed.

Affirmed.

General No. 7679 Agenda No. 74

October Term, A. D. 1923.

The People of the State of Illinois, Ex Rel Olive Welch
Appellee

vs.

Frank McDonald, Appellant

Appeal from County Court of Piatt County.

SHURTLEFF, J.

This proceeding was instituted by appellee on the relation of Olive Welch, against the appellant in Justice Court of Piatt County ,the complaining witness testifying that she was an unmarried female and that on the 30th day of December, 1921, she became pregnant and with child, which, when delivered, would be deemed a bastard. She stated under oath in her complaint, that appellant, Frank M. McDonald, was the father of her child. Appellant was arrested May 14, 1922, in pursuance of said complaint, waived examination in Justice Court, and gave bond for his appearance before the County Court of Piatt County.

There have been two trials of this case in County Court. Upon the first trial there was a disagreement by the jury and upon the second trial there was a verdict finding the appellant guilty and a judgment establishing that appellant is the father of said child and decreeing that he shall pay certain sums for the support of said child, totalling eleven hundred dollars, in accordance with the provisions of the statute.

Appellants has brought the record to this court for review, upon appeal.

It is contended by appellant that the county court of Piatt

County was without jurisdiction to try this case; that section 4 of the Bastardy Act provides that courts having jurisdiction of causes coming within the terms of an Act entitled, "An Act relating to children who are or may hereafter become dependent, neglected or delin-

quent, to define these terms and to provide for the treatment, control, maintenance, adoption and guardianship of the persons of such children," approved April 21, 1899, in force July 1, 1899, as amended, shall have jurisdiction, etc., and that the Session laws for 1899 at page 131 provide that the title of the Juvenile Court Act is as follows: "An Act to regulate the treatment and control of dependent, neglected and delinquent children." Counsel insist there was no act approved April 21, 1899, having title such as is given in Section 4 of the Bastardy Act as amended.

It is further insisted that the amounts involved are beyond the limit of the Law jurisdiction of the County Court, as provided in section 7 of an Act entitled, "An Act to Extend the Jurisdiction of County Courts and to provide for the practice thereof, to fix the time for holding the same, and to repeal an Act therein named (Approved March 26, 1874.") See Par. 177, Chap. 37, Smith-Hurd's Rev. Stat. 1923.

As to the latter objection, it is sufficient to say that it relates to an entirely different class of cases. Said section seven specifically confirms the jurisdiction to that class of cases "wherein justices of the peace now have or may hereafter have jurisdiction, where the amount claimed or the value of the property in controversy shall not exceed one thousand dollars ($1000)." Justices of the peace have never had jurisdiction in bastardly proceedings to hear or try the case. The only juris-

diction conferred upon justices of the peace in such proceedings, is to examine and admit to bail, or determine the question of "probable cause" and commit or discharge. This is not jurisdiction as contemplated by said section seven of the County Court Act, and we know of no reason why the Legislature may not, under section eighteen of article six of the Constitution, provide by general law that County Courts should have jurisdiction of this subject matter, as it has provided, in many other acts, that the Coun-

ty Court should have jurisdiction over various other subjects.

But appellant insist more strongly that section four of the Bastardy Act, basing the jurisdiction of this class of cases upon the title of an act purporting to have been passed in 1899, which in fact was not passed in 1899, and that being the sole authority for conferring jurisdiction upon the County Court, the courts must follow the language of the act and can interpolate no extraneous language into the act, or determine the legislative intent in passing the act in contravention of its obvious and plainly expressed language. The full title of the Act referred to, passed in 1899, is: "An Act to regulate the treatment and control of dependent, neglected and delinquent children."—This is not the language of the title of the Act described in said section four of the Bastardy Act. However, the Act of 1899 was amended at various times. It was amended in 1901, in 1905 and again in 1907.

In the amended Act of 1907 (Session Laws 1907, page 70) the title of the Act was amended and it was enacted that:

"The title of this Act shall read as following: An Act relating to children, who are now or may hereafter become dependent, neglected or delinquent, to define these terms and to provide for the treatment, control, maintenance, adoption and guardianship of the persons

of such children."

Section four of the Bastardy Act recites the act, by title, as above set forth and adds: "Approved April 21, 1899, in force July 1, 1899, **as amended,"** so that it is plain that the Legislature not only had in mind, but by express language stated, not the exact Act by title as passed in 1899, but the then (1919) Act and the title thereof, as it was in existence in 1919, the same being made up from the Act of 1899 and the amendments of 1901, 1905 and 1907 thereto.

As to section four of the Bastardy Act as it now reads, approved June 28, 1919, no question is raised as

to the legality of said section four, in conferring jurisdiction, by reference to the title of the Act. Section four expresses the correct title to the Act, as it existed June 28, 1919, and in express terms states the date of the passage of the Act as of April 21, 1899. But in the amendatory act of 1907, in the title of the Act, this date is given as April 1, 1899. In the body of the Act of 1907, the date is described correctly and appellant urges that that is a discrepancy and fatal to the validity of the Act. If this question can be raised in this Court, the variation in dates is a mere clerical error and the date surplusage. **School Directors v. School Directors,** 73 Ill. 249; **People v. Onahan,** 170 Ill. 462; **Village of Melrose v. Dunnebecke,** 210 Ill. 428; **Patton v. The People,** 229 Ill. 512; Wilder v. **Aurora, etc. Traction Co.** 216 Ill. 520. The County Court under said section four, had jurisdiction to hear and try this cause. A different rule applies to such cases in counties having a population of over five hundred thousand, in which Juvenile Courts are established. Peopel v. Fenelon, 224 Ill. App. 213.

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Appellant next contends that while it is sufficient for the People to establish its case by a preponderance of the evidence, yet the preponderance of the evidence must be established beyond a reasonable doubt, or the verdict of the jury, finding the defendant guilty, will, as a legal conclusion, be deemed the result of passion and prejudice and not from a fair and impartial finding from a due and deliberate consideration of the evidence in the cause. Appellant cites **Cunningham v. The People,** 210 Ill. 410, which was a prosecution for rape under the Criminal Code, and the rule there laid down is not applicable to the facts in this case. The cause being a civil proceeding, the defendant may be found guilty on a preponderance of the evidence. **Lewis v. The People ex rel,** 82 Ill. 104; **Mann v. The People,** 35 Ill. 467; **People v. Christman,** 66 Ill. 162; **Allison v. The People,** 45 Ill. 37. But the verdict of the jury should be set aside if it is against the clear weight and preponderance of the evidence.

Bradley v. Palmer, 193 Ill. 15; **Drum v. Capps,** 240 Ill. 553.

Appellant insists that the verdict is against the greater weight and preponderance of the evidence, and a number of cases have been cited: **The People v. Engert,** 202 Ill. App. 299; **The People v. Frawley,** 185 Ill. App. 388; **The People v. Cutler,** 200 Ill. App. 469, and other cases where the reviewing court, upon a consideration of all the evidence, has reversed the verdict and judgment, and appellant insists the verdict should be reversed in this case as not supported by the preponderance of the evidence. We have carefully reviewed all of the testimony, not being unmindful of the importance to the reputation of each of the interested parties to this cause, the effect of the deter-

mination of this suit may be.

Relatrix, Olive Welch, was a young lady about thirty years of age, living with her parents in Monticello. She had two married brothers living away from their father's home, one in Monticello and one in Decatur. The relatrix was employed as a bookkeeper and clerk in a confectionery store kept by W. S. Calvin in Monticello and had had similar employments during several years. Relatrix was evidently from a good family and they were all members of the church, though relatrix had not joined until she came to womanhood.

The appellant was a man about forty years of age, a farmer, having a farm about two miles from Arthur, which is about twenty-nine miles from Monticello, and apparently in prosperous circumstances. He had a Stutz roadster car and a Ford. Appellant had made a practice of singing at church revivals and cantatas during the fall and winter months, and had been called to various places throughout the country to perform service of this kind, once to Florida, sometimes to Indiana and to various places in Illinois, and he had received remuneration for such work. Neither appellant or relatrix had ever been married, and there is nothing in the testimony to show that the relatrix had ever kept company with or received at-

tentions from any other man. Appellant in 1919 was filling an engagement with the church at Monticello, to which the relatrix belonged, singing at a cantata. During that time he met and was introduced to the relatrix at a Mrs. Creech's where a church supper was being given According to the testimony of the relatrix, appellant asked to accompany relatrix to the church and at the close of the cantata asked to accompany her home. This was evidently in the spring of the year. Relatrix testified to two letters she received from appellant during the summer of 1919, which

were in the nature of invitations and which had been destroyed. Relatrix again saw appellant at the Monticello races in the fall of 1919, where they again met by accident, and appellant took relatrix and her sister-in-law to her father's home. After this, appellant and relatrix met at various times up to about the first of January, 1922. According to the testimony of the relatrix, appellant would come to Monticello and take her riding, take her to shows and the theatre, and visited her. In this relatrix is corroborated by her parents, her brother, her employer and other witnesses. According to appellee's testimony, the appellant visited her as frequently as twice a month and some of them testify to more frequent visits, except at times when appellant was at some distant point engaged in a song service. Relatrix testified that in October, 1919, after appellant had driven her in from the Fair Grounds, he invited her to go to a show and that he spent the evening at Monticello, took her to a show and "loitered" about a half hour after the show. Relatrix testifies that evening he told her: "Olive, I am getting old, I will tell you the truth, I am looking for a wife; do you like, love or care anything about me?" She testifies that she said: "Well, Frank, I like you," and in answer to what she meant by "like" she testifies that she said, "I regard like or love the same. It runs in my mind you either like a person or you hate them." Relatrix testifies that ap-

pellant agreed to marry her and she further testifies that she and appellant had sexual intercourse the second time she met him, which would be in the evening after the races just recounted, and she testifies that she and appellant has sexual intercourse after that at various times in 1919 and 1920,

and that they had sexual intercourse on December 27, 1921, in her parent's home, although she states to the best of her recollection she did not have intercourse with appellant at any other times in 1921 except on December 27. Her testimony in regard to the earlier acts of intercourse is somewhat vague. She could give no specific date or place. She testifies that sometimes it occurred in the home and sometimes they would ride into the country and it occurred in the Ford car, but she insists it usually took place when appellant came to see her.

Appellant denies all of the charges made by relatrix in regard to intimacy; states that he met her at Mrs. Creech's and took her to the church and in the fall met her at the Fair Grounds and took her and her sister-in-law home, and while appellant admits he has called on her he states that it has only occurred about a couple of times each year, and denies that he has ever written her, asking the privilege of calling, and denies positively that he ever promised to marry her or even discussed marriage, and denies that he ever had sexual intercourse with her.

Relatrix produced and the People introduced in evidence about two dozen postal cards and letters written by appellant to the relatrix. There were about six or seven cards and letters which bear no date. The balance are dated and run from about July, 1920, to the month of May, 1922. Appellant addresses relatrix as "Dear Olive" and signs his name as "Frank" or "McD." These letters are not filled with effusions of any kind but are rather platonic as to when he can see her, when she will be engaged, and that he can see her, if it is Saturday

evenings after she has finished work. The letters also cover very frequently the subjects of rains, roads, etc., and when he was in the South as to how long

he must stay

and when he could get home. One card from Florida bore a poem entiled "Honey Come Down."

Appellant wrote relatrix October 29, 1921, from Albion in this State, asking relatrix to write him "if she could have him the last of next week? Suppose Saturday p. m. you will be busy?" And again on November 3, 1921, appellant writes from Albion. He addresses her as "Dear Olive," and says: "You work Saturday and if I come I can see you after you quit. I will try and come Sunday, if I don't Saturday. If Sunday would do just as well, plan it that way and I'll be there then. You work if you want to and I can see you after you quit and if I'm not there Sat. will come Sunday. I'll call you and see if it is O. K. If you will write me at Arthur, I think I l will get the letter by Sunday a. m. anyway."

Nearly all of the communications show a strong interest and desire to see her, but couched in a platonic manner.

The communications are strongly contradictory that appellant only saw her twice a year and never wrote asking to see her. Relatrix testifies that she met appellant in Monticello on the evening of December 27, 1921; that she did not know he was coming that evening; that she just learned that appellant was in Monticello at Mrs. Calvin's office; that Mrs. Thompson called her at that office, by phone; that she immediately went home and found her brother and appellant there; that appellant asked her if she received the present he sent her Christmas and asked her how she liked it and she told him "fine" and that appellant said that was a lovely box of handkerchiefs you sent. Relatrix testified that she sent him stationery and not handkerchiefs and she later offered in evidence a manicure set, five pieces in pearl handle, which she testified she received from appellant.

Relatrix testified that appellant had been to supper and that he invited her to go to a show; that they drove to the center of town in his Ford car and parked it on the south side of the square. Appellant further testified that they were too early for the show and that appellant suggested they go to the confectionery store where relatrix worked, but she said she saw enough of that daytimes and suggested that they go up to Mrs. Calvin's office. It was about a quarter to eight. Relatrix testified that they went up to Mrs. Calvin's and she introduced appellant to Mrs. Calvin and to Mrs. Louis Meyers and her daughter, Katie. The relatrix testified that Mrs. Meyers stated to her that this was Mooseheart Lodge night, and, as relatrix belonged to that Order, Mrs. Meyers asked her if she was not going to attend the meeting, and relatrix said no, that she, relatrix, and appellant had other arrangements. A circumstance came up about appellant calling a name Zybell that he saw in the room and pronounced Zy-Bell, which all present in Mrs. Calvin's rooms remembered and testified to.

Relatrix and appellant, according to her testimony, attended the show and arrived at relatrix's home about ten or ten thirty. It was shown that the front door opened very hard and when it came open it created a noise or jar which relatrix's mother always heard. The parent's had gone to bed in another part of the house. Relatrix testified that appellant and herself walked just through the parlor into the living room and stood by the stove to get warm and then returned to the parlor and sat down on the settee and conversed for a while. Up to this point, relatrix is corroborated by her father and mother and brother as to appellant being in the home earlier in the evening, and she is corroborated by Mrs. Calvin and by Mrs. Meyers and her daughter Katie as

to appellant and relatrix being in Mrs. Calvin's office or rooms that evening, and Mrs. Meyers and her daughter Katie both testify that they attended the Mooseheart Lodge that evening and of transactions that took place

and the record of the Lodge was produced to show that the meeting took place on Tuesday evening, December 27, 1921.

Relatrix testified that she and appellant had sexual itnercourse that evening in her room at her parent's home in Monticello. Relatrix's room was just off from the parlor. The child was born on September 24, 1922, exactly two hundred seventy days after December 27, 1921, and Dr. Hawthorne testified that two hundred seventy days was the natural and normal period of gestation though in cases it ran over and under.

Appellant testifies that he did not see the relatrix on that day at all. He states that he corresponded with her in 1921 and produces two letters, one written by relatrix May 1, 1922 and the second written September 24, 1922. Appellant states that he first met relatrix at Mrs. Creech's and that he was with her once at Mrs. Calvin's office but that it was not in December, 1921. Appellant testifies that on one occasion he might have been in relatrix's bedroom; that it was right off from the parlor; that he did not think he had ever visited the relatrix over twice a year and not more than four times in all.

Appellant states that on December 21, 1921, he was home in the morning; that he came to town (Arthur) about noon and got ready to go to Chicago; that he saw Dr. Graham and Mr. Younger in the afternoon and signed a replevin bond; that he left Arthur in the afternoon in a five passenger Ford car and went to Arcola;

that the roads were very bad and he left his car at Jones Garage late in the afternoon and took the five o'clock Illinois Central Railway to Chicago; that he saw a young lady, Ada Overweiser, who worked at Decatur, on the train and she left the train at Champaign; that appellant went to Chicago to attend the National Evangelistic Convention which began on the afternoon of December 27th and lasted until the night of the 30th; that appellant came home the night of the 30th and a young man says he

came after the car at about ten thirty on the evening of the 30th. Appellant further testified that he thought he stayed at the Great Northern Hotel in Chicago the night of December 27th and that he registered late in the evening; that he stayed two nights at the Y. M. C. A., which was near the Twelfth Street station, and one night at the Great Northern Hotel. It was around this testimony as to an alibi that was the chief contention in the case. Evidently appellant's testimony was the same as upon the first trial and appellant had produced the witness L. A. Thompson, an automobile machinist, who was the night man at Jones Garage in Arcola in December. 1921. Thompson had testified on the first trial that appellant had brought his car to the garage about five o'clock in the afternoon of December 27, 1921. Thompson did not so testify upon the second (present) trial. On the first trial this witness had fixed the date from a hunting trip he had taken, as he first thought, between Christmas and New Years, but later found that this trip was in the early part of January, 1922, and the witness could not, upon this trial, testify that appellant brought the machine to the garage upon December 27, 1921. There are also certain defects in appellant's statement as to when he arrived in Chicago. Appellant had tes-

tified on the former trial that he had been unable to obtain the records of the Great Northern Hotel and the Y. M. C. A., as to the days appellant stated he was in Chicago. Appellee produced George W. Yost, assistant manager of the Great Northern Hotel, with the register sheets for December 27, to 30, 1921, and appellant, finding the witness present at the trial, put him on the stand. The sheets showed that appellant registered at the Great Northern Hotel, Chicago, in the middle of the afternoon of December 28, 1921. The records of the Y. M. C. A., could not be obtained, having been destroyed at the end of the year. Appellant, if in Chicago three days, was there December 27th, 28th and 29th, 1921. He was back in Arcola the evening of the 30th. If appellant

stayed one night at the Great Northern and two nights at the Y. M. C. A., then he changed his room every night, staying at the Y. M. C. A., the 27th, the Great Northern the 28th and back to the Y. M. C. A., the 29th. That would not be impossible, but it appears unreasonable. Appellant is just as liable to be mistaken about being in Chicago the night of the 27th as he could be mistaken as to the hotels where he stayed. His attention was called to the matter early in May, 1922 about five months after he had visited three or two days in Chicago and when the records of both places could have been easily obtained. Appellant is doubtless confused and mistaken as to these dates in some manner. There is no doubt but that appellant was in Arthur and signed the replevin bond, and was with Dr. Graham until about two p. m. of Tuesday, December 27, 1921. There is no doubt but that Ada Overweiser was not working at the dining room in the Inman Hotel, Champaign, on the 23d, 24th, 25th, 26th and 27th of December, 1921, because the record shows that she was not there. She lived at Mattoon and she fixes the date from

the fact that she went home the day before Christmas, the 24th, and returned the 27th and met appellant on the train. The record produced by the bookkeeper shows she was not at the hotel December 23d and had no meals there and if she is mistaken as to one day in the beginning of the vacation, she may be confused or mistaken as to one day at its close.

Thompson, who testified that appellant brought his automobile to the garage on the evening of December 27th, on this trial states that he can only say that it was some time in the latter part of December, 1921, and he does not remember whether it was the 27th or not. C. D. Robinson, of Arthur, at whose home appellant was taking his meals in December, 1921, testified that appellant ate at their home on December 27th at twelve noon and was not there again until the morning of the 31st at breakfast, and the witness Lawrence received a comic

postal card from appellant at Arthur the morning of December 29th. All of this may have occurred and appellant could have been at Monticello the evening of the 27th. In fact, appellant's testimony and the records of the Great Northern Hotel indicate very strongly that appellant is mistaken about being in Chicago the evening of December 27th, and when the appellee's testimony is considered and the number of witnesses testifying that they saw appellant in Monticello the evening of December 27, 1921, we cannot say that the verdict of the jury is against the manifest weight and preponderance of the testimony.

The testimony of the relatrix is not free from contradictions and corrections and exceptions are made to the rulings of the Court in refusing to permit appellant to ask impeaching questions in connection with the testimony given by relatrix on the

former trial. However, in most cases relatrix answered admitting the differences in her testimony, which in very many cases were upon immaterial matters. In other cases the ground for impeachment had not been laid, the complaining witness not having been interrogated thereunto, and was incompetent. **Regnier v. Abbott,** 2 Gilman, 34; **Johnson v. The People,** 140 Ill. 354, and even though there are some erroneous rulings in this regard the judgment should not necessarily be reversed. **People v. Strand,** 268 Ill. 542; **Common v. People,** 39 Ill. App. 31.

On the trial the Court gave nineteen instructions for appellant and twenty-two for appellee. The appellant has objected to and assigned error upon the giving of each and every one of the instructions for appellee, and appellant has argued the assignment of error upon each instruction. It will be impossible to set out all the points raised as to each instruction and as to many of them it will not be necessary. We shall cover such as we deem necessary to a conclusion upon the case.

It is objected that the first instruction does not in-

form the jury as to the charge against the appellant, yet it does state that the question to determine is, whether appellant is the father of relatrix's child. This is substantially the issue required by the statute to be made up.

Instruction number two, while not commended, has been held not error, as a preliminary instruction upon determining the credibility of witnesses and weight to be given testimony where other instructions amplify upon the subject. **North Am. Restaurant v. McElligott,** 227 Ill. 317.

Instructions number three and four are not subject to the criticisms made by appellant.

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Instruction number five, informing the jruy that they should, under certain circumstances, take into consideration the conduct and demeanor of the witnesess, together with all the other evidence in the case, has been criticised in form but held not reversible error. **Heenan v. Howard,** 81 Ill. App. 634. In **J. C. R. R. Co. v. Burke,** 112 Ill. App. 421, an instruction informing the jury what it was their duty to consider in determining credibility was held to be error, but not necessarily reversible error in every case. However, appellant, in his nineteenth instruction presented substantially the same rule of law, that in determining the weight to be given to the testimony of the several witnesses the jury should take into consideration their interest, etc., their demeanor, etc., and their apparent fairness, etc.

Appellee's instruction six was approved in substantially the same form in **Johnson v. The People, supra.**

Appellee's seventh instruction is subject to the same criticism as appellee's fifth and appellant's nineteenth instructions. The instruction does confine the jury to the evidence, facts and circumstances proven on the trial and is not subject to that part of the criticism directed against it.

Appellee's eighth instruction informs the jury that the proceeding is civil, though criminal in form, and that the only question for the jury to determine is, whether

the appellant is the father of the child in question. The instruction further states the law, as to the payments to be imposed by the Court in case the jury found the defendant guilty. The instruction to the jury as to the amount of the penalties was error. **The People v. Welch** 143 Ill. App. 193; **People v. Welch** was reversed but there were other

sufficient assignments of error set out and established. The admission of hearsay testimony in People v. Welch, supra, was shown of statements made by the complaining witness to various persons, and erroneous instructions, and it is not shown that the Court would have reversed the case on this instruction. In **People ex rel v. Preston,** 188 Ill. App. 93, a similar instruction was given, and it was held argumentative and improper, but there were other sufficient grounds upon which the cause was reversed.

Appellee's tenth and eleventh instructions do not state the law incorrectly, but could have stated it better. Appellee's twelfth instruction omits to use the word "solely" in connection with the number of witnesses testifying to determine the preponderance of the evidence, but in this respect the instruction could not have prejudiced appellant. We do not think the jury could have been misled by this construction.

The thirteenth instruction for appellee informed the jury substantially that the date of the charge set out in relatrix's complaint was immaterial, if the jury believed from all the evidence that relatrix had made a mistake in fixing said date, and the jury believed from the evidence that appellant was the father of the child. Appellant contends that this is error and that where the evidence shows but one act of intercourse within the period of gestation, appellee is bound by the date charged in the complaint. The date is specified as on the 30th day of December, 1921 and not under a videlicit. The proof tends to show that the only act of intercourse within such period took place December 27th.

It has been held in instructions in certain cases, it is

error to instruct the jury that the date of the charge was imma-

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terial where the date went to the credibility of the witness, or where for some other reason defendant's defense was prejudiced by the variation of the proof. **Matteson v. The People** 122 Ill. App. 66, but the rule is that the relatrix is not bound by the date of the charge in the complaint, as a pleading, where an act of coition is proven within the gestation period. **Holcomb v. The People,** 79 Ill. 409. In this case the court said: "The question is, whether appellant is the father of the child, and it matters not whether he became so on one day or another. Shall it be said that, in all other cases, criminal and civil, the precise day is not material, and that it shall be in this? Shall we hold that public policy requires that the law shall be so strictly construed and so rigidly administered, that fathers of bastard children shall escape supporting their illegitimate offspring, and that the community shall be burthened therewith? Neither public policy, reason nor justice requires it, nor does precedent sanction it."

In this case relatrix testified to the mistake in the date of the charge, and states that she swore to all of the complaint except as to the date, but informed the State's Attorney that she could not, at that ime, be certain of the date. The issue in both trials was centered around December 27, 1921, and appellant was in no manner prejudiced by the variation as to date.

Some statements of the witness to the State's Attorney, not in the presence of appellant, were incompetent and should have been excluded, upon objection made, but were not prejudicial. The criticism of appellee's fourteenth instruction is very hypercritical and what we have said as to the thirteenth instruction applies to the fifteenth.

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Instructions sixteen and seventeen, merely inform the jury that if they believe from all the evidence that appellant had opportunity to and did have sexual inter-

course with the relatrix on or about the date alleged, the jury should not presume that some other person was the father of said child, unless such presumption was based upon some evidence in the case. The instructions are not subject to the criticism made against them.

Instructions eighteen and nineteen warn the jury that they are not to be moved or swayed by prejudice or sympathy, and that they should not acquit the defendant because the defendant was an evangelistic singer, if they believed he was such, or by prejudice against the said relatrix, because she may not be the equal socially and mentally of the appellant, if the jury so believed from the evidence. Appellant's fourteenth instruction was of the same nature, but only mentioned feelings of sympathy toward the prosecutrix and influence of emotions against the appellant. No cases are cited by appellant and from all the testimony in the case we cannot hold that the instructions are subject to the criticisms made or prejudicial to appellant.

Instruction number twenty merely states that one of appellant's defenses is what is known in law as an alibi and the nature of the defense of an alibi. It is not error that this instruction does not contain all of the elements in the case. It does not purport to contain any of the elements in the case except the matter of the alibi.

The instructions are to be taken as a series. Appellee's twenty-first instruction is severely criticised and in effect informs the jury: that, first, where the People make out such a case as would sustain a verdict of guilty, and second, the de-

fendant offers evidence, the burden is on him to make out that defense, and third as to an alibi and all other like defenses that tend to overcome the case made out by the People, or to evenly balance the testimony made out by the People when the proof is in, fourth, then the primary question is,—the whole evidence being considered, both that given for the defendant and for the People,—is the defendant guilty by a preponderance of all the evidence, facts and circumstances, if any,

proven in the case?

Appellant contends that the language of this instrucition places the burden of proof as to any such defense upon appellant and is error. The instruction does not require the appellant to establish the defense by any degree of proof. It does not mention the matter of proof. It merely states that the "burden is upon him to make out that defense;" in other words, the burden is not upon appellee to negative such a defense. The instruction in the fourth part, to which all the preceding is preliminary and leading up, states the true rule. In **Eggman v. Nutter,** 155 Ill. App. 390, it was held, page 393:

"In the giving of plaintiff's third and fifth instructions the court erred, as they are not accurate statements of the law. The fifth instruction told the jury in substance that it was incumbent on the defendant to establish by a preponderance of the testimony the truth of the defense which they have pleaded before they could recover, and the same meaning is to be found in the third. 'Upon the whole case the burden of proof is on the plaintiff to show such a state of facts as would authorize him to recover.' **Conkling v. Olmstead,** 63 Ill. App. 649; **Merritt v. Dewey,** 218 Ill. 605."

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Appellant further objects to this instruction because taken with instruction number one it does not state the issue in the case, and appellant contends that none of the instructions in the series state the full issue to the jury. Section four of chapter seventeen (Smith-Hurd Rev. Stat. 1923) provides that the court shall cause an issue to be made up, "whether the person charged, aforesaid, is the real father of the child or not." This is the statutory issue and all of the issue.

Appellant contends that the instructions should cover the facts effecting such child a bastard, that the mother was unmarried and the child born alive. Such facts may be placed in issue and rebutted on the trial, and where such facts are disputed in any manner upon the trial, they become part of the issue. In this case the proof showed that the relatrix was a single person and

that the child was born alive and was still living. This testimony was not disputed or inquired into by appellant. Such facts were, therefore, not a part of the issues submitted to the jury. As to facts about which there can be no controversy, it is not error to assume their existence in an instruction. **O'Rourke v. Sproul,** 241 Ill. 576. The instruction given was not error in this case and the issue was properly presented to the jury in several of appellee's instructions. If there was any question about the sufficiency of the issue presented to the jury, it is sufficient to say that several of appellant's instructions presented the issue in substantially the same language.

To one of the instructions given, appellant makes the objection that it does not inform the jury that they should be guided by the instructions of the Court in determining the issues submitted. Neither the instructions given for appellee or for the appellant

contain this direction. A party cannot complain of an error in instructions where the same error is found in the instructions offered by the complaining party. **McInturff v. Insurance Co. of N. A.** 248 Ill. 92; **Hardig v. St. Louis Nat. Stock Yards,** 242 Ill. 444; **Brennen v. The Chicago and Carterville Coal Co.** 241 Ill. 610.

We have carefully reviewed all of the instructions given for appellee in this case, and while some of them are not free from error and a part of them could have expressed the rules of law more tersely, we are not able to say that any of the instructions in this case contain such error that the verdict and judgment of the lower court should be reversed.

There were expressions by the Court, in making rulings, such as, "She didn't respond as you wanted her to," "I think the witness is taking care of herself," "That is good enough," and other like expressions which were entirely out of place and should have been omitted, but we are unable to determine that appellant was prejudiced thereby. Certain statements were made by counsel for appellee, in the argument before the jury, that were ob-

jected to on the ground that they were inflammatory and tended to create prejudice with the jury, but upon a careful examination of these statements they were within the line of argument from inferences to be drawn from evidence before the jury. Appellant objects to the manner of argument by counsel on the submission of the cause. Appellee was represented by three counsel and appellant by two. Over the objection of appellant, counsel addressed the jury alternately. First appellee opened the argument and was followed by one of the counsel for appellant, then a second argument was submitted by a counsel for appellee, after which counsel for appellant closed his case

and the closing argument was made by counsel for appellee. It is contended that appellee's full opening statement should have been made before appellant's counsel was compelled to reply. However, appellant's counsel did have opportunity to reply to appellee's full statement of the case. Such matters are within the discretion of the Court and where an abuse of discretion is not shown, the cause should not be reversed.

We have given a great deal of time to an examination of the record and a consideration of this case. That the record is not free from error is substantially admitted and is easily discernible upon examination. These errors are, however, slight and the question arises, whether substantial justice has been done or whether appellant would have an opportunity to arrive at a different result upon another trial. In the view this Court has taken of the case, the jury were amply warranted in arriving at the verdict found on any submission of the competent evidence produced. Appellant's testimony that he had only a casual acquaintance with the relatrix and met her not over twice a year, is flatly contradicted by his letters and postal cards covering a period of nearly two years. As to appellant's testimony that he was in Chicago on the evening of December 27, 1921, while the testimony of Ada Overweiser is somewhat corroborative, appellant's testimony and the records of the Great

Northern Hotel are nearly sufficient to refute appellant's claim that he was in Chicago on the evening in question. These matters, in connection with the numerous, unimpeached witnesses who testify that they saw him in Monticello on the evening of December 27th, will render it impossible, in the view of this Court, for appellant to ever secure a different verdict from a

fair and impartial jury.

That there is error in the record is not always ground for reversal. In **Young v. McConnell,** 110 Ill. 83, the Supeme Court said, page 84: "We are not prepared to adopt a rule that we will reverse in every case of conflict in the evidence because of some slight error in giving or refusing an instruction. When the evidence clearly sustains a verdict, this court never reverses because of error in instructions, and the Appellate Court is doubtless governed by the same rule, as it is required by the law. We can not say that court did not so act in this case."

In **Knight v. Seney,** 290 Ill. 11, the Court said, on page 25: "In our view of the law the issues could not reasonably have been found against plaintiff if the testimony complained of had not been admitted. No reason is apparent why a different result might be expected if this judgment were reversed, and in that state of the record the judgment should not be reversed for an error in the admission of testimony of the character here complained of. **Bettis v. Green,** 171 Ill. 495; **West Chicago Street Railroad Co. v. Maday,** 188 id. 308; **West Chicago Park Comrs. v. Boal,** 232 id. 248; **Casey v. Chicago City Railway Co.** 237 id. 140; **People v. Cleminson,** 250 id. 135; **People v. Halpin,** 276 id. 363; **People v. Craft,** 282 id. 483." And in **First Nat. Bank v. Miller,** 235 Ill. 135, the Court said, on page 145: "While some errors were committed by the trial court, we do not consider them of a character to justify a reversal of the case. (**Chicago and Eastern Illinois Railroad Co. v. Rung,** 104 Ill. 641; **Hill v. Parsons,** 110 id. 107.) We do not see how a new trial could result differently from the one here in question. **West Chicago Park Comrs. v. Boal,** 232 Ill. 248."

And in **Greene v. Greene,** 145 Ill. on page 271, the rule was laid down: "Conceding the position of counsel to be accurrate, the question would arise, whether, by the instruction, the jury were misled to the prejudice of proponents. If, upon consideration of the whole case, it is apparent that the instruction could have worked no injury, the giving of it, although erroneous, will constitute no ground for a reversal of the decree. **Preisker v. The People,** 47 Ill. 382; **Young v. McConnell,** 110 id. 83; **First Nat. Bank v. Dunbar,** 118 id. 625."

And the same rule is held in **Lehigh Valley Trans. Co. v. Sugar Co.** 228 Ill. 133; **C. & A. R. R. Co. v. Sullivan, Admx,** 63 Ill. 293; **Cohen v. City of Chicago,** 197 Ill. App. 381; **I. & I. S. Ry. Co. v. Wilson & Son,** 77 Ill. App. 603. In the last case the Court, quoting, **Conklin v. Burdick,** 6 Ill. App. 163, said:

" 'There can be no question that several erroneous instructions were given to the jury on the trial of this case. We think, however, upon a careful examination of all the evidence in the record, substantial justice has been done by the verdict of the jury.' In **St. L. V. & T. H. R. R. Co. v. Morgan,** 12 Ill. App. on page 258, the court says: 'We do not regard some of the instructions as accurate, but it seems to us that substantial justice has been done, and that a new trial would result in the same judgment.' We cite as supporting this rule, **Dishon et al v. Schorr,** 19 Ill. 59; **Boynton v. Holmes,** 38 Ill. 59; **Parker v. Fisher et al** 39 Ill. 164; **Watson v. Woolverton,** 41 Ill. 241; **Pahlman v. King, Admx.** 49 Ill. 266; **C. & A. R. R. Co. v. Sullivan, Admx.** 63 Ill. 294; **Beseler v. Stephani,** 71 Ill. 400; **Hewitt v. Jones,** 72 Ill. 218."

The rule has been where the court can see, from the competent

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testimony in evidence, that substantial justice has been done, the judgment and verdict will not be reversed, for error in giving instructions or in the rulings upon the admission of evidence. It is the opinion of this Court that that rule should be followed in this case.

The judgment of the County Court of Piatt County is affirmed.

Affirmed.

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General No. 7682 Agenda No. 5

October Term, A. D. 1923

Carl Lauver, Appellee

vs.

T. H. Downing, Appellant

Appeal from Circuit Court of Fulton County.

SHURTLEFF, J.

Appellee received a judgment against appellant in Justice Court in Fulton County, on November 24, 1922.

The appellant sought to perfect an appeal from the judgment of the justice of the peace to the Circuit Court of said County, and on the 2nd day of December, 1922, which was within the statutory period of twenty days, executed an appeal bond with security as provided by statute, and delivered the same to the clerk of that court, who duly approved the bond and regularly filed the same in his office on that date.

On the same day and shortly prior to the filing of said bond with the clerk of the Circuit Court a conversation took place between T. Mac Downing, then sole attorney for the appellant, and Eugene Whiting, clerk of said Circuit Court concerning the payment of the filing fee and the issuing of a supersedeas and summons in said case. After the bond was filed, Deputy Clerk Edith Lilly placed the bond in the bond box in said office and both the Circuit Clerk and Deputy Circuit Clerk forgot to issue the supersedeas and summons and also forgot to place the case on the general docket for

the January Term, A. D. 1923, of said court. The amount of the fee was not actually paid by the appellant until January 2, 1923.

The case was placed upon the docket of the court for the May, 1923, Term of the Circuit Court, and the appellee, Carl Lauver, appeared specially on May 21, 1923, and filed his motion to dismiss the appeal for the reason that same had not been perfected in the manner required by statute in that the fee provided by law had not been paid, either to the clerk or the justice within twen-

ty days from the date of the rendition of the judgment. The affidavit of Glenn Ratcliff in support of said motion was attached to and made a part of the motion.

The appellant moved to strike appellee's motion from the files. The Circuit Court of Fulton County denied appellant's motion to strike and dismissed the appeal upon motion of appellee and the cause is brought to this court for review.

In 1919 the Legislature amended the statute, providing for appeals from justice court, (Smith's Revised Stat. Chap. 79, par. 116) and provides as follows: "Appeals from judgments of justices of the peace and police magistrates to the Circuit or County Court, and in the City Court in cities in which there is a City Court, shall be granted in all cases except on judgments confessed, and in the County of Cook appeals may also be granted to the Superior Court of said County. The party praying for the appeal shall, within twenty days from the rendition of the judgment, pay the fee provided by law for the filing of such appeal, and enter into bond with security to be approved and conditioned as hereinafter provided, in substance as follows: * * * * *

"The bond shall be approved by and filed with either the justice

of the peace rendering said judgment or the clerk of the court to which the appeal is taken. When the bond is filed with the justice and payment of the fee for the appeal made to him, he shall suspend all proceedings in the case, and if execution shall have been issued he shall recall the same and shall, within twenty days after receiving the appeal fee and receiving and approving the bond, file the bond in the office of the clerk of the court to which the appeal is taken, and pay to him the fee for the appeal. If the bond is filed with the clerk of the court to which the appeal is taken, it shall be approved by him, and upon the approval of the bond, the clerk shall issue a supersedeas enjoining the justice and constable from proceeding any further in said suit, and suspending all proceedings in relation thereto, and he shall issue a summons to the appellee to appear at the

term of the court to which the appeal is returnable, which summons and supersedeas shall be served and returned as summons in other cases. As soon as the supersedeas, issued as aforesaid, shall be served on the justice who gave the judgment and the constable in whose hands the execution or other process may be in relation thereto, they shall suspend all further proceedings thereon. The justice shall, within twenty days after the filing of the bond with him and the payment of the appeal fee, or the service upon him of the supersedeas, deliver to the clerk of the court to which the appeal is taken, all the papers in the case and a transcript of his docket in the case with a certificate under his hand that said transcript and papers contain a full and perfect statement of all the proceedings before him."

The amendment of 1919 authorizes the fee in case of an appeal from the justice of peace to be paid to the justice and provides

for the transmission of the fee by the justice to the clerk of the court to which the appeal is taken . This provision is as follows:

"When the bond is filed with the justice and the payment of the fee for the appeal made to him, he shall suspend all proceedings in the case, and if execution shall have been issued he shall recall the same, and shall within twenty days after receiving the appeal fees and receiving and approving the bond, file the bond in the office of the clerk of the court to which the appeal is taken, and pay to him the fee for the appeal."

The right of appeal is a statutory one, and can only be availed of by complying with the substantial requirements of the statute authorizing it. In order, therefore, that an appeal may be sustained, the right of the party of appeal must clearly appear, and it is consequently lost by any failure to comply with the statutory regulations. **Fairbanks v. Streeter,** 142 Ill. 226; **People v. Andrus,** 299 Ill. 50; **Bowlesville Mining and Mfg. Co. v. Pulling,** 89 Ill. 58; **McCarthy v. City of Chicago,** 197 Ill. App. 564.

It has been held that where the bond is filed with

the justice of the peace, the payment of the fee is mandatory and jurisdictional and that the same must be paid within twenty days from the rendition of the judgment. **Conklin v. Tobey,** 224 Ill. App. 142.

The statute is equally mandatory where the bond is filed with the clerk of the court to which the appeal is taken. The language of the statute must be followed. The statute provides that the party praying the appeal shall, within twenty days from the rendition of the judgment, pay the fee provided by law for the filing of such appeal, etc. Appellant contends that the act does not apply when the bond is filed with the clerk of the court, for the

reason that the clerk, prior to the passage of this act, had the right to demand the payment of all fees in advance under the fees and salaries act. We do not consider that this has any bearing upon the statute governing appeals. In any case, when the clerk of the court desires to pay the docket fee for the appellant, and advances the sum, issues the summons and supersedeas, and dockets the cause, we know of no law which prevents him from doing so. But the clerk of the court did not advance the fee for the appellant in this case and it was not paid until after the twenty days had expired, and the Circuit Court, therefore, committed no error in dismissing the appeal.

The judgment of the Circuit Court of Fulton County is affirmed.

Affirmed.

235 I.A. 632

General No. 7685 Agenda No. 53

October Term, A. D. 1923

Forest G. Gyles and Lloyd H. Worth, doing business as the Worth-Gyles Grain Company, Appellee

vs.

Hasenwinkle Grain Company, a corporation, Appellant

Appeal from McLean County Circuit Court.

SHURTLEFF, J.

This is a suit in assumpsit on the common counts to recover an alleged indebtedness of $517.04. Appellant pleaded in defense an indebtedness owing by the appellee which had been assigned to appellant. A demur to the plea was sustained. Affidavits of claim and merit and the plea of general issue were withdrawn. Appellant stood by its plea. Judgment for $517.04 and costs was entered in favor of plaintiff, from which the defendant appealed.

Appellant, a grain company, transacted business with the Worth-Gyles Grain Company, a partnership, consisting of Lloyd H. Worth and Forest G. Gyles. It is alleged that there is a balance of account of $517.04 due from the appellant to the partnership. On January 26, 1923, Gyles commenced this suit as an individual against appellant and filed an affidavit of claim with common counts. Appellant pleaded the general issue and filed an affidavit of merits denying that he owed Gyles. Gyles amended his declaration and affidavit of claim on February 17, 1923 to show that the alleged debt was owing to the partnership, and made Worth

a party plaintiff. Appellant did not at that time plead to the new declaration.

On February 23, 1923, appellant acquired a claim of $538.02 against the partnership and notified Gyles and Worth. On February 26, three days later, the partnership assigned its chose in action to A. E. Behrendt and on March 2, 1923, attorneys for the partnership noted the assignment on the record of the suit and filed the written assignment in the cause.

Appellant had no notice of the assignment before March 2. On March 6th appellant filed a plea against the new actual plaintiff, setting up the claim of $532.02 against the partnership which it had acquired before the assignment from Gyles to Behrend was made and before defendant had notice of the assignment from Gyles to Behrendt, appellee.

The trial court held that the plea offered to set off a claim acquired after beginning of suit and sustained the appellee's demurrer to the plea.

Appellant withdrew its plea of general issue and stood by its special plea. The affidavits of claim and merit were withdrawn and the court rendered judgment on the demurrer.

Appellant assigns as error that the trial court refused to permit it to plead the Worth-Gyles partnership debt of $538.02 acquired by appellant before this suit was assigned to E. A. Behrendt as a defense against the right of Behrend to recover money owing to the Worth-Gyles partnership.

Appellant contends that, "upon the existence of those equities which move the courts to allow set-offs unavailable at law a set-off may be allowed of a claim accruing after the commencement of the action," citing 34 Cyc. p. 751 (note 18) and **Eigenman v. Clark**

(51 N. E. 725.) In this case plaintiff, assignee, brought suit upon an indorsed note, upon which defendant claimed to have made a payment to the payee after suit brought. It was shown that the note was assigned after maturity, of which the defendant had no notice, and that the defendant was surety for the payee and that the payee was insolvent. In this case the court held it was an equitable set-off and could be pleaded regardless of the statute requiring set-offs to be availing at the time of the commencement of suit. The rule is that a demand not owned by the defendant at the commencement of the action cannot as a general rule be set-off in equity (34 Corpus Juris, 756); and although plaintiff is insolvent, a demand

against him purchased with full knowledge of the insolvency, does not afford equitable ground to deviate from the rule (34 Corpus Juris, 756).

It has been held by our own courts that a set-off must be a subsisting demand at the time of the beginning of suit. **Pettis v. Westlake,** 3 Scam. 535; **Kelly v. Garrett,** 1 Gil. 649; **Ellis v. Cothran,** 117 Ill. 461; **Felthousen v. Lanward Company,** 159 Ill. A. 417.

Plaintiffs instituted this suit against appellant before appellant acquired its claim from the San Jose Co-operative Company. The law is well settled that a debtor can not buy up claims against a plaintiff after suit is brought against him and, by producing them on the trial, defeat plaintiff's action and subject him to the payment of costs (**Pettis v. Westlake,** 3 Scam. 535).

It was held in **Ellis v. Cothran, supra:** "In pleading a set-off, the defendant assumes the position of a plaintiff, and is required to prove the same facts which he would be required to

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prove if he had brought an original action on his demand. (**Kelly v. Garrett,** 1 Gilm, 649.) A defendant, after suit brought, can not purchase claims against the plaintiff and set them up as a defense, nor can he recover upon demands becoming due after he has been sued."

Appellant cites cases, **Barber v. Barth,** 192 Ill. 460; **First National Bank v. Hogg Co.** 181 Ill. App. 220; **Chicago Title & Trust Co. v. Aff,** 183 Ill. 91 and Section 18 of Chapter 110, Practice Act of this State, where it is held and provided: "The assignee of a chose in action takes subject to all equitites and set-offs existing at the time of the assignment." We have examined all of these cases and the statute and in none of the cases or in the Act is the question of an assignment and notice, after suit, brought, raised.

Appellant further contends that the action of assumpsit is an equitable action and judgment in such action should be entered only for the sum which ought to be paid, citing **Smith v. Riddell,** 87 Ill. 169. It was held in

Smith v. Riddell, supra:

"The action of assumpsit is an equitable action, and judgment in such action should be entered only for the sum which ought to be paid. Courts look at the substance rather than the form of contracts, and seek for the real intention of the parties, from a consideration of all parts of the contract. The intention thus ascertained is the essence of the contract, and to this legal effect is given."

We do not see how this contention can change the rule of law as to pleading a set-off. The Worth-Gyles Grain Company brought suit against appellant on January 26, 1923, in the name of Gyles alone. On February 17, 1923, plaintiff amended by making his partner Worth a co-plaintiff, and the partnership was known as the

Worth-Gyles Grain Company. At that time appellant had no set-off against this claim. Appellant did not procure the set-off until February 23, 1923. If appellant could not plead this set-off against the Worth-Gyles Grain Company at any time in this suit, why should it be permitted to plead the same against the assignee of the former plaintiffs?

Appellant shows no equity or extraordinary circumstance as a reason for presenting the set-off in this suit, even if the courts of this State should concede a rule similar to the holding in the Indiana case. It is not claimed that the Worth-Gyles Grain Company is insolvent or that there is any reason preventing appellant from recovering the amount of the set-off from that corporation direct. Appellant does not present a set-off owing from the assignee, the substituted plaintiff, to appellant. That question is not in this case. The set-off in question is presented against the Worth-Gyles Grain Company, the right to which must have been subsisting at the time this suit was brought or when the partnership was brought into the case.

The court below correctly ruled in sustaining the demurrer to appellant's plea and the judgment of the lower court should be affirmed.

Judgment affirmed.

235 I.A. 632

General No. 7689 Agenda No. 56

October Term, A. D. 1923

The New Idea Spreader Company, Appellant

vs.

Meade McClatchey, Appellee

Appeal from Circuit Court, Fulton County.

SHURTLEFF, J.

This is an action in assumpsit in which appellant seeks to recover the sum of $561, being twenty per cent of the contract price for certain merhandise appellee agreed to buy from appellant, as liquidated damages, under the terms of a contract of March 30, 1920, contained in the first and second amended counts of the declaration.

Appellee filed four pleas to said declaration, viz: (1) non-assumpsit; (2) release before suit brought; (3) acceptance by plaintiff of merchandise referred to in amended declaration, in full satisfaction and discharge of the sums mentioned in said declaration; and (4) that the provision in the contract providing for the payment of twenty per cent of the contract price plus twice the freight from the factory, was inserted therein not as liquidated damages, but as a penalty and **in terrorem** for the purpose solely of insuring the prompt performance by defendant of the contract by reason whereof plaintiff is not entitled to recover said sum as liquidated damages.

A demurrer was interposed to the fourth plea and overruled, appellant standing by its demurrer.

A trial was had before a jury and at the conclusion of the evidence both parties asked a peremptory instruction. The court gave the instruction asked by defendant and entered judgment on the verdict in favor of defendant for costs.

The provisions of the contract material to an understanding of the issue presented by this record are as follows:

"The party of the second part agrees not to counter-

mand this order except on payment to the party of the first part of 20 per cent of the net amount of the goods herein purchased, and twice the freight from the factory on any goods, which may have been shipped, as liquidated damages.

"The title to and ownership of all goods shipped under this contract shall remain vested in the party of the first part until the price thereof shall be paid in cash, or until all notes given under this contract are paid, but nothing in this contract shall be deemed as releasing the party of the second part from his or their obligations to paying for said goods as per the notes herein contemplated."

Appellant in making out its case introduced the contract; two letters from appellee countermanding shipment of merchandise, and a letter from appellant to appellee dated July 3, 1920, stating that the letter of appellee of the 29th reached appellant too late to stop shipment and that car containing merchandise went forward on July 1st.

From the testimony of the manager of the Peoria branch of appellant and the testimony of the agent of the T. P. & W. Railway it appears merchandise was shipped from Coldwater, Ohio, to appellee on July 2, 1920, and not on July 1st, as claimed in letter of appellant.

On July 21, 1920, appellant wrote the following letter to the agent of the T. P. & W. Railway at Canton, Illinois:

"T. P. & W. Freight Agent,

Canton, Illinois.

Dear Sir:

The accrued demurrage on the car of Spreaders, because of Mr. McClatchey failing to unload them must be paid by Mr. McClatchey.

Please keep this in mind and do not let the charges follow to destination with the freight charges.

Yours very truly,

New Idea Spreader Company,

I. P. Smith,

Manager."

The car containing the merchandise was received at Canton, Illinois, on July 12th by the T. P. & W. Railway. Appellee refused to accept delivery of same. Car remained in Canton until July 22d. The demurrage charges amounted to twentythree dollars. The railroad agent as Canton wired the general freight agent on July 22, 1920, stating appellee refused to unload merchandise and asked for instructions as to disposition of car. In answer to his wire the general freight agent instructed him to let full car go forward to Ferris.

On July 23d car containing merchandise was forwarded to Ferris, Illinois. Appellee paid the demurrage charges of twenty-three dollars.

The manager of the Peoria branch of appellant stated that he gave general freight agent of T. P. & W. Railway instructions to communicate with appellee that appellant would take spreaders and ship to Ferris if appelfee would take care of demurrage. That appellee acted on his statement, paid demurrage, and spreaders were shipped by appellant's instructions to Ferris, Illinois, and were resold without loss to appellant.

The foreging arrangement was made by the Peoria representative of appellant after a telephone conversation with the director of branches of appellant located in Chicago.

The spreaders were shipped to Ferris pursuant to directions of appellant's manager at Peoria, Illinois, and the account of appellant against appellee was closed.

A credit memorandum was issued by the home office of appellant at Coldwater, Ohio, passed through the Peoria office and was delivered to appellee.

The credit memorandum referred to was subsequently identified by appellee and introduced in evidence. It is in the words and figures following:

"Credit Memorandum
The New Idea Spreader Co.
Manufacturers of
Manure Spreaders.
Coldwater, Ohio,
8-20-20

Mead & McClatchen,

Canton, Ill.

We credit your account as follows:

To Spreaders retd to one transfer Weishart Bros.,

Ferris, Ill.

15—No. 26 Nisco—177.00	----------	2655.00
6—Straw att—	25.00 ----------	150.00
		$2805.00

No. 10

Salesman"

From the foregoing memorandum taken in connection with the evidence of the manager of the Peoria branch, at the time covered by the transaction, it appears appellant fully confirmed and ratified the action of its district manager by the issuance of the credit memorandum which was forwarded from Peoria by mail to appellee.

It further appears that appellee never had any other account with appellant, so it follows that the credit memorandum referred to merchandise shipped under contract of March 30, 1920.

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Appellant contends that the court below erred in overruling appellant's demurrer to appellee's fourth plea and both parties have made extended arguments, citing authorities as to the merits of this plea. In the view we have taken of this case, it will not be necessary to pass upon this contention. Appellee presented three additional pleas, all conceded to be good and sufficient pleas, and if the judgment for appellee can be predicated upon either of the good pleas, it will be sufficient to support the judgment. Appellant contends that the appellee, having admitted the making of the contract and depending upon the plea of release, it is in effect a plea of confession and avoidance, on the part of appellee, and the appellant having made out a **prima facie** case, the court under no circumstances had a right to direct a verdict, but that the issue was for the jury. Appellant cites **Gault v. Babbitt,** 1 Ill. App. 130. In this case the charge was slander and the defendant filed the plea of the "General

Issue" and there was a stipulation that the defendant might show any facts in justification that could be properly pleaded specially. It was held that the defendant had only justified to a part of the charge. However, in this case, the court says: "Indeed, as we understand the law, no amount of evidence in support of a plea in confession and avoidance, can justify a court in taking from the jury the finding of the issue under it."

No authorities are cited by the court and where the only issue is the existence or continuance of a contract, we question whether such rule is the law applicable to the case. Appellant also cites

Offutt v. Columbian Exposition, 175 Ill. 472, in which no such question was involved. It was, however, held in **Offutt v. Columbian Exposition, supra,** p. 474:

" 'There may be decisions to be found which hold that if there is any evidence—even a scintilla—tending to support the plaintiff's case it must be submitted to the jury. But we think the more reasonable rule which has now come to be established by the better authority, is, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. **(Pleasants v. Fant,** 22 Wall. 120; **Randall v. Baltimore and Ohio Railroad, Co.** 109 U. S. 478; **Metropolitan Railway Co. v. Jackson,** 3 App Cas. 193; **Reed v. Inhabitants of Deerfield**, 8 Allen, 524; **Skellenger v. Chicago and Northwestern Railway Co.** 61 Iowa, 714; **Martin v. Chambers,** 84 Ill. 579; **Phillips v. Dickerson,** 85 id. 11)' "

Appellee's defense in this case is not confined to the second and third pleas. The whole defense rested substantially upon the contention that there was no longer any subsisting contract between the parties at the time the suit was brought.

A plea of the general issue, in an action by the seller for breach of the defendant's agreement to receive mer-

chandise, puts the plaintiff upon proof of the material allegations of the declaration. **The Iroquois Furnace Company v, The Bignall Hardware Company** 201 Ill. 297.

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The plea of the general issue puts upon the plaintiff the burden of not only proving the contract, but also the breach of it as assigned in his declaration.

Under the plea of the general issue in assumpsit, the defendant may give evidence that the contract sued upon was void or voidable in law; or if good in point of law, that it was performed by payment or otherwise; or if unperformed, that there was some legal excuse for the non-performance—as, a release or discharge before breach, or non-performance by the plaintiff of a condition precedent.

The question in assumpsit under the general issue is whether there was a subsisting debt or cause of action at the time of commencing the suit; anything which goes in discharge of the promise upon which the action is founded, is admissible under the general issue, and any matter which shows that the plaintiff never had a cause of action may also beg iven in evidence under this plea.

Evidence of the rescission of the contract sued upon is properly admissible in evidence, under the general issue in actions of assumpsit. **Ward v. Athens Mining Co.** 98 Ill. App. 227.

In an action of assumpsit, evidence is admissible under the general issue which tends to show that the plaintiff assented to the abandonment and repudiation by the defendant of the contract in suit.

Where one party to a contract seeks to abandon the same and the other party thereto by conduct has acquiesced in such abandonment and affirmatively taken a position inconsistent with its existence, the contract is deemed to have been abandoned by both parties and to be no longer operative as against either of them. **McKenna v. McKenna,** 118 Ill. App. 240.

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There was no dispute in this case but that appellee entered into the contract with appellant. It was further

shown by appellee, and not disputed in the case, but that appellee countermanded the order of June 29, 1920, before the shipment of the goods and notified appellant, both at its head office in Ohio and at its sales agency at Peoria. It is further shown and undisputed that on the arrival of the goods appellee refused to accept them and the car stood upon the tracks at Canton unloaded for several days, until the demurrage charge of the railway company amounted to twenty-three dollars.

Appellee further proved by the agent of the appellant, in authority at the general sales agency of appellant at Peoria, that an arrangement was made with appellee, by which appellee was to pay the demurrage charge at Canton and the appellant was to accept the goods back from appellee. This arrangement was carried out. Appellee paid the charge for demurrage and appellant shipped the goods to Ferris, Illinois, and the testimony shows that the goods were distributed to the trade, without loss or pecuniary damage to appellant. At least, no damage is shown other than the agreed damage recited in the contract.

Some effort was made to question the good faith of appellant's former agent, who negotiated this transaction, but nothing tangible was shown, and appellant, with full knowledge of the facts, on August 20, 1920, from its main office in Coldwater, Ohio, sent appellee a credit statement for the entire account and the matter was closed. Under this state of the proof regardless of the merits of appellee's fourth plea and the construction of the contract between the parties, there was no issue of fact or evidence tending to make an issue of fact before the jury

There were rulings by the Court upon the admission of certain letters, written by appellant's General Agent or Manager at Peoria, which were refused, but appellant has not assigned error on these rulings, or presented or argued any question as to these rulings. Some question was raised by appellant as to the authority of its former general manager at Peoria and appellant's

written contract with and authority to him was read in evidence, and we think under the terms of the written agreement appellant's agent had full authority to settle and adjust the matter with appellee. This adjustment, having been made and having also been ratified by appellant at its general offices at Coldwater, Ohio, there was no longer any subsisting contract between the parties at the time this suit was brought and the Court committed no error in taking the case from the jury and instructing a verdict for appellee.

The judgment of the lower court is affirmed.

Affirmed.

General No. 7690 Agenda No. 65A

October Term, A. D. 1923

J. S. Bache & Co., Appellant

vs.

Kempton Farmers Elevator Company, Appellee

Appeal from the Circuit Court of Ford County.

SHURTLEFF, J.

Appellee brought suit in the Ford County Circuit Court to recover a balance of $2406.42 paid out by appellant for purchases and sales of grain made for appellee, on the Chicago Board of Trade. Appellant's declaration consists of one common count in assumpsit for a balance for grain bought and sold by appellant for appellee, with a bill of particulars of the trades set out in the count and the common counts. Appellee pleaded the general issue, with a notice of set off that appellee would offer proof on the trial that appellant, at the time of bringing suit, was indebted to appellee in the sum of five hundred fifty dollars upon a check, which is set out and which was issued in the name of appellants without the knowledge or authority of appellee, and stating that on the "trial defendant will set off and allow to plaintiff any demand that the plaintiff may prove according to law against the defendant, so much of said sum of money due the defendant from plaintiff, as will be sufficient to satisfy any claim of plaintiff, proven as aforesaid, and defendant will ask a judgment back, etc."

There was a trial by the court, a jury being waived, and a finding and judgment for appellee, and the record is brought to this court by appeal for review.

The testimony shows that appellant is engaged in the business of buying stocks, grains and provisions, having their principal office in New York; that they are members of the Board of Trade of the City of Chicago and have an office in Chicago; that appellee, Kempton Farmer's Elevator Company, was incorporated for the sum of eighty-five hundred dollars, having its principal office at Kempton, Ford County, Illinois, the incorporat-

ors numbering about one hundred fifty farmers, living in and about the neighborhood of Kempton. The purpose of its incorporation, stated in the Charter, reads:

"The object for which it is formed is to own, construct, operate and lease a store building, or store buildings, one or more, an elevator or elevators, one or more, and to buy, sell, barter, exchange, handle, deal in, store and ship, all kinds of grain, seeds, and other farm products, of every kind and character and description."

On the 14th day of October, A. D. 1919, the appellee entered into a contract with one A. J. Hartquest, in which the said Hartquest became the General Manager of the said Elevator Company at Kempton. It provides in part as follows:

"That the party of the second part shall and will undertake the general management of the said business of the said Party of the first part, at Kempton, Ill., aforesaid, and shall and will conduct such business to the best of his ability and discretion, under and in accordance with the said party of the first part, by and through the order of its directors, the said party of the

second part, shall and will take charge of the money, and all other property of the said party of the first part used in the conduct of its said business. * * * *

"Said party of the second part further covenants and agrees not to make any sale, or sales, purchase or purchases, in the name of or on account of the party of the first part, of any grain, of any kind, on or through any member of the Board of Trade of Chicago or elsewhere, unless directed to do so, by a resolution of the Board of Directors of the said party of the first part duly and regularly adopted. * * * *"

At the time of the transactions set out in plaintiff's amended bill of particulars, appellant maintained offices at Kankakee, Illinois, which were under the charge of one Peter N. Wagner. This office was about twenty miles from Kempton, where appellee's principal office was located. The sales and purchases set out in appel-

lant's amended bill of particulars were made first, by the General Manager of defendant, with appellant's agent at Kankakee, and the same were afterwards confirmed at appellant's offices in Chicago. When the sale or purchase was completed, a confirmation in writing was sent by appellant to appellee, at its main offices in Kempton.

These purchases and sales were all made, on the part of appellee, by Hartquest, the General Manager of appellee and without the knowledge or approval of appellee.

The check of appellee, for the sum of five hundred fifty dollars, signed in the name of appellee by A. J. Hartquest, "Mgr." and payable to appellant, was paid to appellant by appellee's bank on August 9, 1920, and is shown to have been drawn without the authority of appellee and that appellee had no knowledge of the transaction.

Appellant first assigns error that appellee, having filed the general issue, with notice of set off only, could not, under objection, introduce evidence for the purpose of showing that the transactions in question were gaming and therefore void in law, and insists that such defense should have been pleaded specially. Counsel cite Chitty on Pleading, Vol. 1, 742 and 515. But it has been held in our State that: When the narr consists of the common counts only, and the general issue is filed, any defense may be made under it that shows in equity and good conscience the plaintiff should not recover. **Beard v. Converse,** 84 Ill. 512; **Meyers v. Schemp,** 67 Ill. 469.

The general rule is that defendant may give in evidence, under the general issue, any matter which shows he was not indebted to plaintiff when suit was brought. **Wilson v. King,** 83 Ill. 232; **Harrison v. Thackery,** 248 Ill. 516.

This question seems to have been passed upon in **Price v. Burns,** 101 Ill. App. 418; **McDonald v. Tree,** 69 Ill. App. 134 adversely to appellant's contention. We cannot agree with appellant's contention upon this assignment of error.

It is next contended by appellant's that when appel-

lee pleaded the general issue with notice of set off, it admitted the legality of palintiff's claim. This is not the law. If appellee had filed a special plea of set off it would have been a plea of confession and avoidance, and in such case the validity of the claim of appellant would be admitted. But by the notice and the general issue, it will be seen that the language is: "That on the trial defendant will set off and allow to the plaintiff any demand that the plaintiff may prove according to law against defendant, so much of said sum of money due defendant from

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plaintiff as will be sufficient to satisfy any claim of plaintiff proven as aforesaid." The distinction between a plea of set off and the foregoing language is apparent. Appellant offered to set off its claim against any demand which appellants would prove according to law. This is not an admission that they were entitled to anything.

That was true in those cases cited, but the question was not presented as to the technical distinction between a plea of set off, and set off under a notice. The notice of set off in this case is not an admission of any part of appellant's claim.

Counsel have devoted much space in their brief and arguments to the question of **ultra vires** appellee corporation to make and enter into the transactions in question, and appellants contend that they are not bound by the terms of the secret provisions contained in the contract of employment between appellee corporation and Hartquest, who conducted the business of appellee, as General Manager, and who made the sales and purchases in question with appellants, members of the Chicago Board of Trade, inasmuch

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as appellee had clothed its agent with apparent authority to transact all business, within the purview of purposes for which such corporation was formed. Appellants quote a long line of authorities such as **Crane v. Jacksonville First Nat. Bank,** 114

Ill. 516; **Union Mutual Life Ins. Co. v. White,** 106 Ill. 67; **Home Life Ins. Co. v. Pierce,** 75 Ill. 426, and many other authorities. We would be much impressed with this rule of law if it was applicable to the facts in this case. The real question in the case at bar, and as contended by appellants also, is, whether the trades carried out by the manager, Hartquest, were **bona fide** and legal sales and purchases of actual grain, and so intended, or whether they were merely speculative and gambling contracts, and so intended by both appellants and the manager, Hartquest. If they were the latter, then appellants could not recover in this suit, and appellee, under the testimony, would be entitled to its set off and it would make no difference what Hartquest's contract of employment was, or however much it may have been restricted or extended.

As to the facts and law applicable to this case, we are more impressed with the situation in the so-called "Strawn cases." **Strawn Farmers Elevator Co. v. Bennett,** 168 Ill. App. 428; **Strawn Farmers Elevator Co. v. West,** 189 Ill. App. 213; **Strawn Farmers Elevator Co. v. McKenna et al,** 194 Ill. App. 490. In the first of the above cases, the Bennett case, a certiorari was denied by the Supreme Court, which made the opinion binding upon this court.

In **Strawn Elevator Co. v. Bennett, supra,** the court held, on page 433:

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"Appellant next contends that as he had no knowledge of the existence of Jordan's contract of employment, it was error for the court to admit the same in evidence over his objection. The object of its admission was to show the limitations of Jordan's authority.

"Appellant had an agent living within five miles of the elevators under the charge of Jordan, through whom his board of trade transactions were negotiated. This agent knew that Jordan's business was that of operating the elevators at Strawn and Risk, and that he made no claim to being more than local manager of these elevators, and such knowledge on the part of the agent was the

knowledge of his principal. Appellant's dealing with Jodan under such circusmtances was on the assumption that Jordan had authority to conduct the board of trade transactions. It is to be remembered that persons dealing with an assumed agent are bound at their peril to ascertain not only the fact of the agency, but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. It is their right and duty to ascertain the extent of his power, and to determine whether his act comes within the power and is such as to bind his principal. Mechem on Agency, Sec. 276; **Reynolds v. Ferree,** 86 Ill. 570; **Merchants Nat. Bank v. Nichols,** 223 Ill. 41. We are therefore of the opinion that it was not error to admit in evidence Jordan's contract of agency."

In **Merchants Nat. Bank v. Nichols,** quoted supra, the court said, page 49: "It is to be remembered that persons dealing with an assumed agent are bound, at their peril, to ascertain not only

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the fact of the agency but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. It is their right and duty to ascertain the extent of his power, and to determine whether his act comes within the power and is such as to bind his principal. (Mechem on Agency, sec. 276; **Reynolds v. Ferree** 86 Ill. 570; 1 Am. & Eng. Ency. of Law—2d ed.—987). An agent cannot confer power upon himself, and therefore his agency or authority cannot be established by showing either what he said or did. **(Proctor v. Tows,** 115 Ill. 138; **Mullanphy Savings Bank v. Schott,** 135 id. 655.)"

In the **Strawn Farmers Elevator Co. v. Bennett, supra,** one of the questions raised was the right or authority of an agent to bind his principal by making, accepting or endorsing negotiable paper.

In **Strawn Farmers Elevator Co. v. West,** 189 Ill. App.

213, in which the elevator company was doing business in substantially the same manner as the appellee in the case at bar, the court held:

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"This agreement might almost suggest that although the corporation was not in form a co-operative arrangement, it was actually intended to be much that kind of an undertaking; that is, to furnish marketing facilities for the grain actually raised by its incorporators. But however that may be, there is, in our opinion, nothing in it which gives or implies power in the manager to engage his corporate employer in any speculative deals in grain upon any grain exchange whatever; and that it did not is, in effect, specially decided in **Strawn Farmers Elevator Co. v. James E. Bennett & Co., supra,** in which case similar speculative dealings with and through another party by Jordan in the name of the Strawn Company were held not to bind the Company.

"It being thus established that the mere fact that the manager, Jordan, sent these speculative orders to be executed on the Chicago Board of Trade in the name of the Strawn Company did not bind that Company, and that such dealings did not come within the general scope of Jordan's employment or authority, and consequently that in the absence of some matter affecting the suituation other than that Jordan was the manager of the Strawn Company, West dealt with him in these speculative transactions at his peril, and must look to him alone for reimbursement,—the question in this case is reduced to whether there is any such matter which implied ratification by, or estoppel on, the plaintiff in regard to these transactions.

"The trial judge below decided there was not, as a matter of fact or of law, and we think he was right."

And in **Strawn Farmers Elevator Co. v. McKenna et al,** 194 Ill. App. 490, it was held:

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"The mere fact that speculative orders to be executed on the Chicago Board of Trade were sent in the name of a corporation by one having a written contract with

such corporation to act as its manager, does not bind the principal on such contracts, where such dealing is not within the general scope of the agency of such manager."

It may be conceded that the powers of the corporation in the case at bar are somewhat broader than the powers of the Elevator Company in the Strawn case, and in the end, the real question in the case is, whether the transactions in question were **bona fide** purchases and sales of grain, if it be conceded that appellee's business and powers contemplated such purchases and sales of grain generally, or merely speculative and so understood by the parties.

Whether Hartquest's covenant in the contract with apepllee not to trade with any member of the Chicago Board of Trade, of which appellant claims to have had no notice, was binding upon appellant, depends upon whether Hartquest's trading and dealing with appellant was within the scope of the buisness with which the agent was apparently clothed with authority as general manager. Kempton is a small village of less than three hundred inhabitants about eighty miles from Chicago. Appellee corporation had about one hundred fifty stockholders, many of whom were known to Peter Wagner, appellant's agent at Kankakee, which is about twenty miles from Kempton. Wagner had known Hartquest and the officers of appellee corporation for several years and had known the nature of the business carried on at Kempton by appellee, and had visited them when connected with other firms. Wagner testifies that his first transaction with

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Hartquest was in July, 1920, and he cannot recall whether it was an order to buy or sell. The trading continued a period of about a month. About one hundred twenty thousand bushels of grain, corn, rye, wheat, etc., was traded in, bought and sold by these transactions. There was no cash grain business in any of these transactions. Wagner knew that Hartquest was merely the manager. The office at Kankakee was equipped merely with a board table, a few chairs, type-

writer, booth for telephone and telegraph operator. Wagner states that Hartquest would call up and state his order and specify whatever the option was,—May, July, September or December.

None of these trades were made in the nature of "Hedges' 'to protect grain on hand or purchased, except the speculative purchases for the future option. Appellee's warehouse was of fifty thousand bushels capacity and its capacity was fully known to Wagner. After these transactions were made, neither party ever requested or called for the delivery of any grain and no payments of any kind were ever made, except Hartquest advanced certain margins. Hartquest testifies that in these transactions there was no intention on his part to furnish any grain upon sales or to receive any grain upon purchases, and from the whole transaction it is evident that appellants and their agent, Wagner, understood that this trading was purely speculative and that all differences were to be settled and adjusted by payment of cash, and that no grain was to change hands. The transactions therefore were purely gambling contracts and void. **Bartlett v. Slusher,** 215 Ill. 348; **Lamson et al v. West et al,** 201 Ill. App. 251. The intent and purpose of the parties may be established by all of the attending circumstances of the transaction. **Pope**

v. Hanke, 155 Ill. 617; **Jamieson v. Wallace,** 167 id. 388; **Weare Commission Co. v. People,** 209 id. 528. Kempton Farmers Elevator Co. v. Klick, Towitz, et al, App. Ct. 2nd Dist. Ill. Oct. Term 1923, was not decided upon the issues raised here. In that case there was a verdict for plaintiff instructed by the court, when the defendant had offered testimony, which the court held, should have been submitted to a jury.

The transactions in question being purely speculative and gambling contracts are **ultra vires** the powers of appellee corporation and therefore not binding upon the appellee. What the construction of the contract between Hartquest and appellee corporation might be, in some transaction between appellee and a member of the

Chicago Board of Trade, within the powers of appellee corporation, we are not called upon to decide in this case and we do not express any opinion upon that question. The judgment of the Circuit Court of Ford County was in accordance with the issues made, and is in accord with all the evidence in the case and should be affirmed.

Judgment affirmed.

235 I.A. 633

General No. 7699 Agenda No. 77

October Term, A. D. 1923

First National Bank of Witt, Illinois, Appellee

vs.

John L. Huber, et al., Appellants

Appeal from the Circuit Court of Montgomery County.

SHURTLEFF, J.

Appellee filed its bill in equity in the Montogmery County Circuit Court, to foreclose a mortgage, given by John L. Huber and Mary Huber, his wife, the mortgage being given to appellee and dated February 10, 1919, and made to secure the payment of three promissory notes of the same date, amounting to the sum of thirteen thousand dollars, with interest at the rate of five per cent per annum. Appellants, having defaulted in the payment of interest upon said mortgage debt, appellee, in accordance with the covenants and provisions of said mortgage, declared the whole debt due and presented its bill to foreclose.

The case comes to this Court upon a decree taken by appellee, upon appellant's default to further answer after the Court had sustained exceptions to all of the substantial averments in appellant's amended answer, and as to the sufficiency of such averments to constitute a defense, in equity to said bill of complaint.

It appears by appellant's answer that prior to the transactions in question, appellant John L. Huber, Henry F. Hoehn then and at all times during said transactionn cashier of appellee bank, W. C.

Florian and G. A. Smith were interested in and stockholders of a mining company, known as the Magnetic Iron and Coal Company of Tennessee, the name of which company had been changed to the Crab Orchard Iron and Steel Company, and that prior to the transactions in question, appellant Huber had been elected Treasurer of this corporation.

We shall recite the salient averments in appellant's

answer, to which the exceptions were sustained and upon which appellants rely as a defense to the bill.

Appellants averred that: The three notes for the principal sums, aggregating, thirteen thousand dollars, and the mortgage given to secure the same, were executed and delivered by appellants to pay off what they believed at that time to be an indebtedness of the appellant, John L. Huber, to appellee in the sum of thirteen thousand dollars; that the indebtedness which they believed that the said John L. Huber owed to appellee arose out of the endorsement of variouo notes and checks prior to that time; that appellant John L. Huber was a stockholder and treasurer in a corporation known as the Magnetic Iron and Coal Company of Tennessee, located in the State of Tennessee; that Henry Hoehn, the cashier of appellee bank, was a stockholder of said company, and that one Florian and one Smith were also stockholders of said company; that the said Florian and Smith were indebted to appellee bank in the sum of thirteen thousand dolars and were unable financially to pay the same; that the said cashier, Hoehn, and the said Florian and Smith, being stockholders of said company, elected Appellant John L. Huber as treasurer of said company; that he was so elected treasurer by said parties for the fraudulent purpose of procuring the signature of appellant John L. Huber to negotiable

instruments to be used by the said Smith and Florain and the appellee bank in paying the indebtedness which the said Florain and Smith owed to the appellee bank; that in pursuance of the fraudulent purpose and design the said Smith, Florain and Hoehn, as cashier, officer and agent in charge of appellee bank, did from time to time during the eighteen months preceding the tenth day of February, 1919, procure appellant John L. Huber to sign notes and checks in the total sum of thirteen thousand dollars, which had been made and executed by the said Smith and Florain and forwarded to appellee bank; that the appellee bank participated in such fraudulent purpose through its said cashier officer

and agent in charge, by telling appellant John L. Huber that the said Magnetic Iron and Coal Company of Tennessee was badly in need of funds for constructing a plant and that it also needed a fund to be used in the more efficient operation of the plant, and the appellant John L. Huber was by the appellee, through its said cashier, officer and agent informed that any and all notes and checks which he so endorsed would be cashed by the appellee bank and the proceeds thereof deposited to the account of the said company and used in improving the plant of said company and in providing a fund for the operation of the same. The appellants aver that without the representations aforesaid, Huber would not have signed or indorsed the notes forwarded to said bank, but relying upon the representations and statements of the officers and agents then in charge of appellee bank, he did indorse each and all of said notes with the understanding that the bank would cash the notes and apply the same to the credit of the company. The answer sets forth that these representations were false and fraudulent and made with the intention of deceiving the appellant, and

that it was a scheme and device to defraud him of thirteen thousand dollars; that it was never intended by the said Smith and Florain or the appellee, or its officers and agents in charge, that the proceeds arising from the cashing of notes and checks endorsed by the appellant John L. Huber, should ever be used by the said company for any purpose, but that on the contrary, it was intended by the said Florain, Smith and appellee bank, through its officers and agents in charge, that any and all notes and checks so endorsed by the said John L. Huber should be deposited to the account of the said company and immediately checked out by the said Smith and Florain and applied to the payment of their indebtedness to the appellee bank. It is alleged in the answer that the false and fraudulent scheme was carried out by depositing the sum of thirteen thousand dollars to the account of said company and immediately thereafter the

same was applied to the payment of the indebtedness of Smith and Florain to the appellee bank. It is alleged in the answer that the appellant John L. Huber never became indebted to the appellee bank in any other wise than through the endorsement of the notes and checks of the said Florain and Smith, the proceeds of which were to be applied to the account of said company and used by it, but which were in truth and in fact misapplied by paying the individual indebtedness of the said Florain and Smith to the appellee bank. The answer sets forth that the said Florain, Smith and Hoehn assumed the financing of said company and directed all the operations of the same and had charge of all the books of account and knew the financial condition of the company, and that said parties also knew the application of all moneys and funds deposited to the credit of said company, especially that deposited to the credit

of said company in the appellee bank; and that the securing of said deposit by the execution of the said notes and checks by the said Florain and Smith and the endorsement thereof and the negotiating of the same to the credit of appellee bank was a scheme, and wrongfully and fraudulently done for the purpose of paying the indebtedness of said Florain and Smith to the appellee bank; that the said Florain and Smith and the appellee knew at the time of the endorsement of said notes and checks, and at the time of depositing the same to the credit of said company, that they were to be converted and misapplied, as above set forth.

Appellants further aver that neither of them knew that the promises of appellee, its officers and agents were false and fraudulent, or that the notes and checks so endorsed by Huber, or that the funds derived therefrom, were to be used by Florain and Smith and appellee in the payment of the individual indebtedness of appellee, or that the same had been so used until after the execution of the notes and mortgage sued on, but during all of said time the true facts about the misapplication of said fund were by appellee, Florain and Smith kept secret from the

appellants; that the whole scheme was a device and fraud of the appellee and the other named persons to be carried out, and that the same was carried out for the purpose of paying the indebtedness of Florain and Smith to the bank, and that said funds were not to be used, and were not used otherwise; that all of said notes were endorsed between the tenth of February, 1919, and the eighteen months previous thereto; that on the tenth of February, 1919, appellee bank requested appellants to execute the notes and mortgage, given to secure the same, herein sued upon; that appellant's, being ignorant of the fraud practiced upon them by the appellee, through its officers and agents

took up the said notes and checks of the said Florain and Smith so endorsed by the appellant John L. Huber, and then held by the bank, and in lieu thereof executed and delivered to the bank the three notes and mortgage securing the same, described in the bill of complaint.

The question is, whether the averments in this answer are pertinent and constitute a defense to the bill. The substance of the defense, as averred in the answer and as claimed by counsel for appellants, in their brief, is: Appellant John L. Huber, by way of accommodation endorsement, intended to loan his credit to the Magnetic Iron and Coal Company of Tennessee, of which he was a stockholder and officer; that, in consequence of the fraud practiced upon him by the bank, through its officers and agents and other persons aiding the bank in its fraud, the paper, which he endorsed, was applied for the use and benefit of the bank and the other persons and not for the corporation which he intended to be benefitted thereby. The fraud set up is not limited to a misapplication of proceeds but also sets up a fraudulent intent in obtaining the appellant John L. Huber's signature to the original notes and checks.

It is appellant's contention that where the signature of the parties was obtained by fraud in the execution of notes, and such notes renewed before discovery of the

fraud, the signers of such renewal instruments, when sued thereon, may successfully defend on the ground of fraud in procuring the execution of both the original notes and the renewal notes, quoting **Vogel v. Pyne** 189 N. Y. Supp. 285; **Schmidt v. Bank of Commerce,** 234 U. S. 64, 58 Law Ed. 1214; **Gilpin v. Netograph Machine Co.** 25 Okla. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477; **Cochran v. Bowersox,** 188 Ill. App. 157.

There is no contention as to this principle of law, and in this case, if the averments in the answer sufficiently charged fraud in the signing and endorsing of the notes and checks, prior to the execution of the mortgage notes, the same defense could be interposed to the mortgage notes, if appellants had not discovered the fraud.

Appellee insists that the averments in the answer do not charge a fraud; "that a general allegation that a party acted fraudulently, or was guilty of a fraud, is a statement of a conclusion and is not a good pleading, as the facts should be averred upon which the charge of fraud is based. **People v. Henry,** 236 Ill. 124; **East St. Louis Connecting Railway Company v. People,** 119 Ill. 182; **Smith v. Brittenham,** 98 Ill. 188; **Jones v. Albee,** 70 Ill. 34; 9 Encyc. of Pl. & Pr. 686; **People v. Baldridge,** 267 Ili. 190; **Dickinson v. Dickinson,** 305 Ill. 521.

Fraud, being a conclusion of law, it is incumbent on one who wishes to plead it to state the facts relied upon as constituting the fraud. An offer to prove it should be of facts and circumstances, and not of the fact of the existence of fraud generally."

It is insisted by appellee that the pleading must be taken most strongly against the pleader and in the averments made it is not shown that Hoehn, the cashier, took any part in the election of Huber as treasurer; that it is not shown that Hoehn was ever a director or offficer of the "Iron Co." and that treasurers are usually elected by the board of directors; that when Huber was elected treasurer by the board of directors he was placed in a position, in the company, where, by the exercise of ordinary care and diligence, he could effectually protect himself as to the

company's finances.

It is further insisted by appellee that even though Florain, Smith and Hoehn assumed the financing of said company and directed all the operations of the same, and had charge of all the books of account and knew about the funds, nevertheless that could only be the same knowledge which Huber possessed by reason of his official position. Appellee insists that Hoehn, not being an officer in said Iron Company or agent for the same, the allegations are entirely insufficient to connect Hoehn with any fraud. There is much force in this contention, when the matters of the Iron Company are considered disconnected from those of the bank.

It is further contended by appellee that while the averments charge that the appellee and Hoehn falsely and fraudulently promised to place the amount of said checks and notes, so endorsed by Huber, to the credit of the Magnetic Iron and Coal Company and its successor, and that in the beginning it was their fraudulent intent not to do so, but to divert said frauds, yet the answer later recites, that all of said funds were placed to the credit of said company, and it is recited that that was one of the means by which the fraud was accomplished.

It is further insisted that the statements charged to have been made by Hoehn to Huber, that the said Magnetic Iron and Coal Company was badly in need of funds for constructing a plant, and that it also needed a fund to be used in the more efficient operation of the plant (this seems to be as far as Hoehn's statements were made in this line) have not been disproved and were not false. Insofar as a fraud and conspiracy is concerned, by averments set out in the briefs and arguments of counsel, it is entirely too meager, in the statements of fact, to charge appellee

or Hoehn in connection therewith. But referring to the averments of the answer in the abstract and record, we find that there are allegations averring that appellant Huber was informed by Hoehn, cash-

ier, that any and all notes and checks endorsed by him would be cashed by the appellee bank and the proceeds thereof deposited to the account of said company and used in improving the plant and providing a fund for the operation of said plant. Appellant avers that he relied upon said statements and would not have endorsed the notes and checks for any other purpose. Appellant further avers that said sum of thirteen thousand dollars so obtained and credited to the account of the Iron and Coal Company in appellee's bank, was never withdrawn by check or otherwise by either of the companies, but was, on the contrary, wrongfully and fraudulently checked out by the said Smith and Florain and knowingly, wrongfully and fraudulently paid to said parties by appellee bank.

Appellant further avers that at the time the said sums were so paid out by appellee bank to Florain and Smith, appellee bank, through its officers and agents in charge, well knew that the sums so received were being converted and misapplied by the said Florain and Smith for their own use and not for the use of said company. Appellants aver their ignorance of all these matters, as to misapplying said fund, until after the execution of the notes and mortgage in question, and the reliance of appellants upon the statements and representations of Hoehn, appellee's cashier. In other words, appellants have charged, after the elmination of more or less surplusage, an offer or agreement on the part of appellant Huber, to sign as accommodation endorser on behalf of the Coal and Iron Company, but that appellee bank has advanced no funds on the strength of such accommodation.

The only necessity for appellant to charge and establish a fraud and conspiracy in this case, to establish a defense to the notes, is the averment in the answer that appellee bank did credit the Coal and Iron Company the amount of said checks and notes, totaling thirteen thousand dollars. Appellants, by their answer, seek to avoid

this averment by two different lines of defense; first, that said sums were wrongfully and fraudulently checked out by Florain and Smith, with the knowledge of the bank, appellee. The import of this allegation is, that neither Florain or Smith had the right to cehck on the funds and in this situation it would not be necessary to show a fraud or conspiracy. This phase of the case is accentuated by appellee in its brief and argument, insisting that: "If appellee bank paid out any money deposited to the credit of the Magnetic Iron and Coal Company, or of the Crab Orchard Iron and Steel Company, its successor, upon checks drawn by unauthorized persons, the bank would be liable to the corporation for such sums, so improperly paid out, in a suit by such corporation.

The deposit of a corporation can be withdrawn only on the order of the officers who have been designated to the bank as authorized to sign checks; and if payment is made on a check improperly signed, the amount may be recovered by the corporation or its receiver. 7 C. J. 676, Sec. 395; Guaranty State Bank and Trust Company v. Oklahoma Coal Company, 209 Fed. Reporter, 350; 126 C. C. A. 276; Morse on Banking, Sec. 440; Zane on Banking, Sec. 135; Havana Central Railroad Company v. Central Trust Company, 204 Fed. Reporter, 550; Honig v. Pacific Bank, 73 Cal. 464; Ellis v. Western National Bank, 136 Ky. 310; 124 S. W. 334.

And that: As a deposit is a matter of contract between

depositor and bank, the depositor may stipulate at the time of deposit, as to how or by whom (there being no statute or by law to the contrary) the money may be drawn out; and when payment is thus made, the bank is discharged from further liability. 3 R. C. L. 541.

Appellee strenuously insists that in case the funds have been checked out of the bank, without authority, then the funds are still in the bank, subject to the order of the corporation. If this is the situation, then the

rights of the parties are to be determined, under the averments in the answer, from the standpoint that appellant is an accommodation endorser or maker, whose accommodation has not been acted upon or used or has been converted or misapplied and the averments would constitute a defense to the bill.

Second. If the view is taken that Florian, Smith and Hoehn had assumed or taken over charge of the business of the corporation and managed the same and that Florain and Smith had authority, express or implied, to check on the fund, then it becomes necessary to establish some common plan to defraud appellants in order to fix the liability of appellee or Hoehn. In fact, it is averred in said answer, "that it never was intended by the said Smith and Florian or the appellee or its officers and agents in charge, that the proceeds arising from the cashing of the checks and notes, endorsed by appellant, should ever be used by the said Company for any purpose, but that it was intended by the said Florian, Smith and appellee bank, etc., that any and all notes and checks so endorsed by Huber, should be deposited to the account of said company and immediately checked out by said Smith and Florian and applied to the payment of their indebtedness to appellee bank."

This charge, in connection with the other averments, if true,

would constitute a fraud and vitiate all that was done in purusance of said plan by said parties, antagonistic to the interests of appellants. The inference from this averment would be that Florian and Smith had some kind of authority to check on the fund. Florian and Smith owed the bank thirteen thousand dollars on their individual account, which they were not able to pay, and the bank could not collect. If appellee bank accepted the endorsements of appellant and later accepted the notes and mortgage in question, with the direction or understanding of appellant, known to the bank, that all proceeds of said checks and notes were to be used in im-

proving the plant of said Iron and Coal Company and in providing funds for its operation, then any other or different use of the fund, without the consent of appellants, would be a conversion or misappropriation of said funds, which would vitiate said notes and mortgage in appellee's hands. Appellant's endorsements and later the notes and mortgage were given plainly for an accommodation to the Iron and Coal Company. The averments of the answer are conclusive that there was no consideration for the endorsements or the notes in question.

Accommodation paper is in general a loan of the credit of the accommodation party to the party accommodated to the extent of the note or bill, and this loan of credit is **prima facie** without restriction as to the manner of its use. **Miller v. Larned** 103 Ill. 562; 8 C. J. 279, Sec. 436; **Tucker v. Mueller,** 287 Ill. 551.

But it frequently happens that the accommodation party lends his credit for a certain purpose only or imposes certain conditions limiting the manner in which his credit may be used. 1 Am.

& Eng. Encly. (2 ed.) 380; 8 C. J. 279, Sec. 436; **Naef v. Potter** 226 Ill. 628; **Keenan v. Blue,** 240 Ill. 177; **Riding v. Hynds,** 154 Ill. App. 429; **Cochran v. Bowersox,** 188 Ill. App. 157; **Straus v. Citizens Bank,** 254 Ill. 185.

This rule has been enacted into statute and section sixteen of the Negotiable Instrument Act provides, that as between the parties to the instrument and as against any other party, not a holder in due course, it may be shown that the delivery of the instrument was conditional "or for a special purpose only." **Straus v. Citizens Bank, supra.** And in this case, appellant has the right, under the averments of the answer, to show that the paper was executed for the accommodation of the Iron and Coal Company and not for the accommodation of Florian and Smith or appellee bank.

Considerable space is occupied by counsel in their briefs in discussing the question of fraud. Appellee con-

tends that the only fraud that can be shown, in derogation of a negotiable instrument, is that fraud or circumvention (under Sec. 10, Chap. 98 Smith-Hurd's Rev. Stat.) used in obtaining the making or execution of a negotiable instrument, and many cases are cited, all heard before the passage of the Uniform Negotiable Instrument Act. Those cases are not applicable to this case. The latter Act has modified the harsh rule that formerly existed and it is now permitted to show fraud in the transaction for other purposes. Section 55 of the Negotiable Instrument Act provides: "The title of a person who negotiates an instrument is defective within the meaning of this Act, when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he ne-

gotiates it in breach of faith, or under such circumstances as amount to a fraud."

A holder in due course, is one who takes an instrument for value and, at the time it was negotiated to him, had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Section 58 of the Act provides that: "In the hands of any holder, other than a holder in due course, a negotiable instrument is subject to the same defenses, as if it were non-negotiable." And Section 59 of the Act provides: "Every holder is deemed **prima facie** to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person, under whom he claims, acquired the title as a holder in due course."

Sufficient circumstances, amounting to fraud, are set up in the averments of the answer, in the opinion of this court, to entitle appellant to a hearing of the cause. These sections of the Negotiable Instrument Act has been sufficiently reviewed to warrant this court in following their trend. In **Justice v. Stonecipher,** 267 Ill.

453, the court passed upon sections 52 and 59 of the Act, and in **Straus v. Citizens Bank, supra,** section 16 was under consideration. It was held in 3 R. C. L. 1042, sec. 247;

"It is established by many decisions that if the party primarily liable proves fraud or illegality in the inception of the instrument, or if from the circumstances a strong presumption of fraud is raised, the holder must then show that he acquired the instrument **bona fide,** for value, under circumstances creating no presumption that he knew the facts which impeach its validity. The rule applies equally, whether the fraudulent practices were connected with the

original inception of the paper or occurred subseqeutnly, to the prejudice of an intermediate holder."

In other states, the cases **Schmidt v. Bank of Commerce,** 234 U. S. 68, 58 L. Ed. 1214, heard on appeal from New Mexico; **Hodge v. Smith,** 130 Wis. 326-110 N. W. 192; **Aukland v. Amold,** 131 Wis. 64 11 N. W. 212; **Canajoharie Nat. Bank v. Diefendorf,** 123 N. Y. 191, 20 N. E. 402, 10 L. R. A. 676; **Delso v. Ellis,** 224 N. Y. 528, 121 N. E. 364; **Gilpin v. Netograph Machine Co.** 25 Okla. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477, have sufficiently discussed the question of fraud and defective title, as intended by the law makers, under the Uniform Act, and the language of the sections and established rules that have been determined, we should not depart from, and under such rules the least we could hold, would be that the averments of the answer, if proven, place the burden of proof upon appellee to show that it is a holder for value and without notice of any infirmities in the instruments.

This cause has been argued and submitted on the basis that it was an action at law and involved only a construction of the statute. The suit is in equity and appellant, regardless of the statute, is entitled to present any equitable defense that he has against said notes and mortgage. **Olds v. Cummings,** 31 Ill. 188, and kindred

cases.

In the opinion of this court, the averments set out in apepllant's answer, if established, constituted a defense to the notes and mortgage and the exceptions to appellant's answer should have been overruled.

The judgment of the lower court is reversed and the cause remanded with directions to overrule appellee's exceptions to appellant's answer.

Reversed and remanded with directions.

235 I.A. 633

General No. 7628

Agenda No. 39

April Term A. D. 1924

The People of the State of Illinois, Defendants in Error

vs.

Paul Galaskis, Plaintiff in Error

Writ of Error to the Circuit Court of Vermilion.

HEARD, J.

The Grand Jury of Vermilion County, at the January 1922 term of said court, presented an indictment containing three counts against plaintiff in error, Paul Galaskis. The sale of intoxicating liquor to one, Joe Urgutis, being charged in the first count; the delivery of intoxicating liquor to said Joe Urgutis in the second and the giving of intoxicating liquor to said Joe Urgutis in the third count. The defendant plead not guilty and a trial by jury resulting in a verdict of guilty he was sentenced to be imprisoned in the county jail for four months. To review this judgment of conviction a writ of error has been sued out of this Court.

It was contended by the State that the defendant, Paul Galaskis, and the prosecuting witness, Walter Royse were partners in the operation of a soft drink parlor on State

Street near the C. & E. I. Railway in Westville, Illinois, from May to September, 1921; that during this period of time the defendant and the prosecuting witness sold intoxicating liquor to the said Joe Urgutis.

The defendant, Paul Galaskis, denied that he was in partnership with Walter Royse during this period of time and denied that he sold intoxicating liquor to Joe Urgutis. Joe Urgutis also testified that he had not purchased intoxicating liquor in this place in question and that he had never purchased intoxicating liquor from the defendant, Paul Galaskis.

Upon the trial the Court admitted evidence of the sales of intoxicating liquor by plaintiff in error at the State Street soft drink parlor during the period from May to September, 1921 to persons other than Joe Urgutis and it is contended by appellant that as the indictment specifically charged that the intoxicating liquor was sold

to one, Joe Urgutis; that evidence of sales of intoxicating liquor to any person other than him was incompetent and irrelavant and that the admission of such evidence constitutes reversible error.

As a general rule in a criminal case evidence is not admissible to show that the accussed has committed crime wholly distinct and independent from that for which he is on trial and that in cases of this character such evidence is not admissible, even for the purpose of raising any inference against the defendant. (Farris v. People 129 Ill. 521; Parkinson v. People, 135 Ill. 401.)

Ordinarily in a case of this kind, where the indictment specifically charges the sale of intoxicating liquor to have been made to a particular person, sales of such liquor to persons other than the one named in the indictment would not be

competent, but in a case like the present one where the defendant was contending that he had sold out his interest in the sift drink parlor in question in April 1921 and that during the period [illegible] no connection with or interest in the business conducted in the soft drink parlor, all of the acts and doings of plaintiff in error with reference to the business conducted in said place during said period were competent as bearing upon the question as to whether or not plaintiff in error was a partner in said business during said time.

Where evidence is competent for any purpose upon the trial of the cause the fact that such evidence shows or tends to show that the defendant was guilty of some offense other than the one for which he is on trial does not render such evidence incompetent. In People v. Spaulding, 309 Ill. 292, it is said: "That evidence offered proves or tends to prove an offense other than the one with which the defendant is charged is never a valid objection to its admissibility. When such evidence is offered the same considerations with respect to its admissibility arise as upon the offer of any other evidence. The question is, Is the evidence relevant? Does it tend to prove any fact material to the issue involved? (People v. Jennings, 252 Ill. 534; Farris v. People, 129 id. 521;

People v. Tucker, 104 Cal. 440, 38 Pac. 195; Commonwealth v. Snell, 189 Mass. 12, 75 N. E. 75.) Evidence of other offenses wholly disconnected with the offense charged is not admissible, for the reason that it does not tend to establish the fact in controversy. Guilt cannot be shown by showing that the defendant has committed other offenses, but where relevant evidence is offered it is admissible nothwithstanding it may disclose another indictable offense. (People v. Cione, 293 Ill. 321.)"

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We are of the opinion that the Court did not err in admitting this evidence. It is contended that the Court erred in refusing to permit the defendant to prove that the witness, Walter Royse, had a license to operate said soft drink parlor and that that license was issued to the witness, Walter Royse. Walter Royse was asked if he had a license to operate the soft drink parlor and he answered, without objection, that he had. Upon being asked a question which called for a portion of the contents of such written license an objection was made which was properly sustained.

There is a sharp dispute in the testimony as to the sale of intoxicating liquor to Joe Urgutis—both the defendant and Urgutis testifying that no such sale was made. Witnesses for the State, however, testified positively as to the sales of "White Mule" by Galaskis to Urgutis, and there is evidence tending to show that Urgutis became intoxicated from drinking such "White Mule." The jury who saw and heard the witnesses found the defendant guilty and we cannot, on the showing made, disturb such finding.

The judgment is affirmed.

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General No. 7710 Agenda No. 9

April Term A. D. 1924

The People of the State of Illinois, Defendant in Error

vs.

Alpheus Kincaid, alias Alfred Kincaid, Plaintiff in Error

Writ of Error to the Circuit Court of Vermilion County.

HEARD, J.

Plaintiff in Error sued out a Writ of Error from this Court. The abstract of the record filed herein does not disclose what the indictment was for nor whom it was against. It does not disclose the verdict of the jury; the grounds of a motion for a new trial by the defendant; that the evidence contained in the abstract was all the evidence heard; what the judgment of the Court was; nor does it disclose what errors were assigned.

We have repeatedly held that while a Court of Review will go behind the abstract for the purpose of affirming a judgment, that where a complete abstract is not filed as required by the rules, the Court will not go behind the abstract and search the record for error, but will affirm the judgment.

The judgment of the Circuit Court is therefore affirmed.

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235 I.A. 633

General No. 7716 Agenda No. 14

April Term A. D. 1924

Wiley Potter, Plaintiff in Error

vs.

James C. Davis, Director General of Railroads, Etc.
Defendant in Error.

Error to Menard.

HEARD J.

This case is before this Court upon a writ of error to review a judgment in bar of the action and for cost in favor of defendant in error against plaintiff in error in a suit for damages for injuries alleged to have been sustained by plaintiff in error in a collision between a freight train of defendant in error and a trackman's gasoline motor driven speeder upon which he was riding on the tracks of the C. & A. R. R. Co., within the limits of Tallula, a village of about seven hundred inhabitants.

The collision in this case is the same collision which was the basis of the suit by Lorena Reid, by Izora Reid her guardian, which was before this Court at the October Term 1921 and in which an opinion was filed July 10, 1922 (Reid vs. Davis, 227 Ill. App. 619). In that case the plaintiff recovered a judgment for $2,000 damages against defendant. This Court reversed that judgment with a finding of facts "that at the time of the accident in question defendant was not guilty of wilful or wanton negligence and that at the time of the accident plaintiff was not on the right of way of defendant at defendant's invitation, either express or implied." Petition was thereafter filed in the Supreme Court for a writ if certiorari which was denied, making the opinion of this Court final.

The evidence in the present case shows exactly the same state of facts as shown in the former case reference to the opinion in which case is made for a full statement of the facts and the legal questions arising thereon.

One question is raised on the appeal which was not raised in the former and that is that under the Federal Control Act of Congress defendant operated all the railroads of the country as one national system; that the gasoline motor car was operated by the defendant over the C. & A. R. R. tracks as a feeder for intersecting lines and

that the plaintiff was a passenger on same. There is no evidence in the record to sustain that contention. Plaintiff in error was not a passenger of defendant in erorr on the occasion in question. In the former case we said: "The speeder party were at best licensees being upon the track with the speeder contrary to defendant's order."

The other questions involved upon this appeal are the same as upon the former and the Supreme Court having declined to review our decision in that case, find no good reason for departing from our former conclusions as to the facts and the law applicable to the case and we therefore adhere to such former rulings.

The judgment of the Circuit Court is affirmed.

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235 I.A. 633

General No. 7656 Agenda No. 36

April Term A. D. 1924

Viva Baxter, Appellee

vs.

Metropolitan Life Insurance Company, Appellant

Appeal from Fulton.

NIEHAUS J.

This is an appeal from a judgment for $2395.00, recovered by the appellee, Viva Baxter, as beneficiary of a life insurance policy, issued by the appellant Metropolitan Life Insurance Company upon the life of appellee's husband, Malcolm Baxter. The principal defense of the appellant to a recovery upon the policy, was that the policy had lapsed by the failure to pay the quarterly premiums which became due August 10, 1921, and November 10, 1921; it was insisted, that the appellee had thereby incurred a forfeiture of her rights as beneficiary. It is practically conceeded, that if the policy lapsed, under the terms and conditions of the policy, then appellee did forfeit her rights. The main controversy therefore is really one of fact, namely, whether the quarterly premiums required by the terms of the policy, were paid. The appellee testified, that she paid the quarterly premium due August 10, 1921, on September 12th, to appellant's agent, Stockbarger; and it was paid in the presence of her mother, Mrs. Eggleston, who lived with her at that time. Mrs. Eggleston also testified, that she was present when the appellee paid Stockbarger the amount of the quarterly premium mentioned, which was $17.40; and that the agent Stockbarger accepted the money for the premium, and promised to send a receipt for the same. The appellee testified also, that she paid the agent, Stockbarger, the quarterly premium due in November, on December

12th; and it also corroborated concerning this payment by the testimony of her mother. In direct contradiction of the testimony of these two witnesses about the payment of the quarterly premiums, appellant's agent,

Stockbarger testified, that the quarterly premium due in August was not paid; that he did not receive any money from appellee at the time testified to, by her; and that the only time he received money on account of a quarterly premium, was about December 19th, after the policy had lapsed for non payment of the quarterly premium due August 10th; that at that time, the appellee paid him $21.50; $17.40 on account of the quarterly premium, and $4.10 for interest on a loan which the appellant had made to the insured on the policy; that he did not accept the $17.40 however, as a payment of the premium, because the policy had lapsed at that time; but took the money as a payment upon the condition, that the policy would be re-instated, and for that reason did not give the appellee an official receipt for the same; but gave her his personal receipt, signed by himself, which he marked, "I. C. R.," which meant that the policy was then in course of revival; that he received the money received from appellee in an envelope, and kept it that way until after the death of the insured, which occurred on February 23, 1922; and that after the death of the insured, he returned the identical money to the appellee. Stockbarger is corroborated by Roy Francis, who was also in the employ of the appellant at that time.

It is urged for seversal of the judgment, that the verdict of the jury is manifestly against the weight of the evidence upon the question of the lapse of the policy, by the non payment of the quarterly premiums which became due. Whether the verdict is against the weight

of the evidence depends upon the credit to be given to the testimony of the witnesses, who testified concerning these payments. The credibility of the witnesses was a question for the jury, who saw the witnesses, and heard them testify. It is apparent, that the jury believed the tesimony of the appellee and her mother concerning the payment of the quarterly premiums; and it follows, that if they did, they necessarily did not believe the testimony of appellant's witness concerning the same matter. This court would not be warranted under these circumstances, in

holding that the jury should have believed appellant's witnesses and disbelieved appellee and her witnesses. If the testimony of the appellee was true, as the jury has found, then she paid the last two quarterly premiums, which became due prior to the death of the insured; and they were accepted by the company's agent, as payments of the premiums due on the policy; and the appellant is bound by the acts of its agent in that regard. Hancock Life Ins. Co. v. Schink 175 Ill. 284; Rataj v. Providers Life Assurance Co. 221 Ill. App. 459. Appellant having thus received payment of the premiums, by its agent, would not be in legal position to declare or enforce a forfeiture of appellee's rights as beneficiary under the policy, even though its agent did not turn over the money he had received, to appellant; and though he did not give to the appellee, an official receipt as the terms of the policy, and the law requires.

It is contended, that the court on the trial erred in ruling out the evidence of the records of the appellant's district office, which were kept at Galesburg, in which it had been noted by appellant in the regular course of business, that the payment of the quarterly premium due August 10th, had not been made: and that the policy had

lapsed. There was no error in he ruling of the court on this evidence. The appellee was not bound by the entries made by appellant in its records; and they were not competent proof against appellee, to show, that she did not pay the quarterly premium due August 10th to appellant's agent, as testified to, by her. Schwarze v. Roessler 40 Ill. App. 474; Stone & Co. v. N. Y. Central R. Co 214 Ill. App. 483.

It is also insisted, that the judgment should be reversed on account of the improper conduct of counsel for the appellee, in reference to the examination of witnesses; and in eliciting improper evidence from witnesses which he examined. Appellant's counsel say in reference to this contention: "In rebuttal Neil Baxter, a brother of appellee, was called and testified, that he was in the office of the appellant at Canton in

February 1922, after the death of the insured, at which time his brother, Adam Baxter, and the agents, Stockbarger, Roy Francis and Earl Jones, were present. Counsel for appellee then asked the witness the following question: 'On that occasion did Archie Stockbarger refer to this policy, and say, that the premiums were paid up, and the policy in good standing?' Before objection could be interposed the witness answered: 'He did.' Upon objection being made to the question and motion to strike the answer—the objection was sustained, and the motion allowed. Counsel for appellee thereupon called Earl Jones, and asked the following question: 'I will ask you if you heard Archie Stockbarger say to Neil Baxter, in reference to this policy, that the premiums were paid, and that it was in good standing, or in substance that?' To which objection was sustained. Counsel for appellee, then stated in the presence of the jury: 'We offer to prove the same statement

by witness Adam Baxter, who is now in court,' to which objection was sustained." Another instance of misconduct cited, occurred on re-direct examination of the appellee, when counsel elicited from appellee, that the assistant district manager of appellant came to her home after the death of the insured, and offered to make a settlement of her claim by the payment of $300.00. Upon motion of the appellant however, this part of appellee's testimony was stricken out. It was improper for appellee's counsel to make an offer of what he could prove by a witness, in the presence and hearing of the jury; it was also improper to purposely elicit evidence of an offer of settlement of appellee's claim, which was in the nature of an offer to compromise. But the court sustained the objection to the evidence referred to, and in the instructions, the court directed the jury not to consider any evidence offered to which objections had been sustained; nor any evidence which had been stricken out. Under these circumstances it does not appear probable that this improper conduct of counsel could have had serious effect upon the determination by the jury, of the issues involved; nor can it be considered of sufficient gravity to require a reversal of the judgment.

It is also contended that some of the instructions are erorneous and misleading. We are of opinion upon careful consideration of the instructions, that when taken together as a series, they are substantially correct statements of the law pertaining to this case, and not misleading; nor do we find any error in the refusal of instructions presented by the appellant. All matters contained in the refused instructions, to which appellant was entitled, had already been covered by other instructions given in its behalf; and Instruction No. 23, was properly

refused because it was not a correct statement of the law applicable to the facts of the case.

The record does not contain any reversible error, and the judgment is therefore affirmed.

Affirmed.

3923a

235 I.A. 634

General No. 7663 Agenda No. 69

April Term A. D. 1924

The Equitable Trust Company of New York, as Trustee, Complainant

vs.

Chicago, Peoria & St. Louis Railroad Company, Bluford Wilson and William Cotter, as Receivers of Chicago Peoria & St. Louis Railroad Company, and Bankers Trust Company, as Trustee, Defendants

On Appeal of Bankers Trust Company, as Trustee, Appellant

vs.

The Equitable Trust Company of New York, as Trustee Appellee

Appeal from Sangamon.

NIEHAUS, J.

In this case the appellee, the Equitable Trust Company, filed a bill in equity in the circuit court of Sangamon county, to foreclose its mortgage, executed March 1, 1900, securing a principal indebtedness of $2,000,000.00, against the Chicago, Peoria & St. Louis Railroad Company and The Bankers Trust Company, as Trustee and holder of another mortgage on the same railroad property. Upon the final hearing of the case, a decree in foreclosure was entered in substantial conformity with the prayer of appellee's bill, and which found, that the appellee had a first lien on all of the railroad property involved. From the decree rendered, the appellant, Bankers Trust Company, as Trustee prosecutes this appeal.

The mortgage of appellee was made by the Chicago, Peoria & St. Louis Railway Company of Illinois, which is referred to for brevity, as the Railway Company; the Railway Company being the predecessor in the ownership and operation of the lines of railroad involved, which is

now owned and operated by the Chicago, Peoria & St. Louis Railroad Company, referred to in this case, as the Railroad Company; and which executed a

general and Refunding Mortgage on January 2, 1913, to the appellant. This mortgage is called Refunding Mortgage; and the mortgage of the appellee is referred to as the Prior Lien Mortgage. The controverted questions involved in this appeal, relate to the liens claimed respectively by the appellee and the appellant, under the mortgages mentioned, and the relative priority of such liens. The controverted liens relate to certain portions of the railroad property designated as "Equipment Series A comprised in Parcel 12," and certain parcels of land, comprised in "Parcel Twelve A, described in Clause XXXI" in the decree.

The court found in its decree, that in and by the Prior Lien Mortgage, the Railway Company, the predecessor of the present company, mortgaged its railroads, and all other property, including all real and personal property, and the franchises owned by the Railway Company, and all property, real and personal, and the franchises thereafter acquired by the Railroad Company, as the lawful successor of the Railway Company; that the Railroad Company acquired the railroad, right, property, and franchises of the Railway Company, and other property, subject to the lien of the Prior Lien Mortgage; and became and now is, the lawful successor and assign of the Railway Company; and in the exercise of its lawful powers and by appropriate corporate action duly assumed the covenants and obligations of the Prior Lien Mortgage and supplemental mortgage, including the obligation to pay the principal and interest of the $2,000,000.00 or prior lien bonds, issued and outstanding thereunder.

That in and by the General and Refunding Mortgage, the Railroad Company conveyed, transferred and assign-

ed all the rights, property and franchises then owned by the Railroad Company, and in that mortgage described; or which should thereafter be acquired by the Railroad Company, by the use of General and Refunding Mortgage bonds, or their proceeds.

That at, and about the time of, the execution of the General and Refunding Mortgage, the Railroad Company duly exe-

cuted, under its corporate seal, and The Bankers Trust Company duly certified and delivered, the $2,850,000.00 principal amount of General and Refunding Mortgage bonds provided for in Section 2 of Article One of the mortgage; and that $1,837,000.00 principal amount thereof, are now issued and outstanding.

That the Prior Lien Mortgage, is a prior and superior lien upon all the property described or mentioned in Clause XXXI of the decree, as comprised in the parcels therein referred to, except the Series A Equipment described in parcel No. 12, and that the supplemental mortgage is a prior and superior lien upon all the property therein described.

That the General and Refunding Mortgage is a valid lien, junior and subordinate, to the lien of the Prior Lien Mortgage; and the lien of the supplemental mortgage, upon the property described or mentioned in Clause XXXI except as to Series A Equipment, and the real property described or mentioned in "Parcel No. 12—A," all of which is free from, and not subject to the lien of the General and Refunding Mortgage.

That the Prior Lien Mortgage is a lien upon the right, title and interest of the Railroad Company, in and to the equipment described or mentioned in Parcel No. 12, subordinate only to the right, title and interest of the Bankers Trust Company, as Trustee, under the agreement of conditional sale, Series A; and that said equipment is free

from, and not subject to the lien of the General and Refunding Mortgage. That the determination of the court as to the respective liens of the Prior Lien Mortgage, and the General Refunding Mortgage, upon the Series A Equipment, and upon certain pieces of Real Estate described or mentioned in Clause XXXI as comprised in Parcel 12—A (being the real estate described in escrow deeds to Harry A. Cushing) confirms the findings made by the special master.

The findings of the special master, in reference to the properties referred to, are as follows: "That the properties described in the escrow deeds deposited with Harry A. Cushing were

and are now subject to the Prior Lien Mortgage as a lien thereon, prior and superior to the lien if any of the General and Refunding Mortgage; and that said properties, if acquired by the Railroad Company, would not be acquired as the result of the use of General and Refunding Mortgage bonds or their proceeds, and that such properties are free from, and not subject to the lien of the General and Refunding Mortgage."

There is practically no dispute about the facts as contended for by the appellant: That in 1912 a consolidated mortgage, given by the Railway Company, providing for a lien, second to the lien of the Prior Lien Mortgage, was foreclosed; and that in this foreclosure proceeding, the properties of the Railway Company, were sold to William W. Stevenson for $750,000.00, which sum was furnished, by a Re-organization Committee, created by, and acting under, a Plan and Agreement of Re-organization; and that the properties sold to Stevenson were conveyed to him, by deed dated December 19, 1912; that this transaction involved all the properties in the foreclosure proceedings; and that in purchasing these properties, and acquiring title thereto, Stevenson was acting in conformity

with the Plan and Agreement of Re-organization, and for the Organization Committee. That the plan of Re-organization provided, that "The Re-organization Committee might in its discretion purchase, or cause to be purchased, subject to the Prior Lien Mortgage of $2,000,000.-00, all or any part of the property and assets of the company, at any sale or sales thereof; and to cause a new company to be created under, and in accordance with the laws of the State of Illinois, in which title to such property and assets, when and as so purchased, should be vested." And that the New Company should assume the obligation of the existing Prior Lien Mortgage of $2,000,-000.00.

That in the agreement of re-organization, it was provided in substance, in Paragraph Eighth, that the Re-organization Committee, might employ, negotiate, deliver and exchange any of the securities of the Railroad Company, that might be received by

the Re-organization Committee, under, or in connection with, the plan and agreement of re-organization; and in the Ninth Paragraph, that the accounts of the Re-organization Committee, should be filed with the Board of Directors of the Railroad Company; and that the accounts when approved by the Board, should be final, binding and conclusive, upon all parties having interest therein; and that thereupon the Re-organization Committee should be discharged.

That the Railroad Company was incorporated in Illinois, on December 6, 1909, pursuant to the "Plan and Agreement of Re-organization" referred to; and that its entire capital stock which was authorized, was issued to Stevenson, except six shares to qualify six directors. That by deed dated December 19, 1912, at the time Stevenson owned all the capital stock of the Railroad Com-

pany, except the six shares referred to, the properties which had been conveyed to him, were conveyed by him and his wife, to the Railroad Company. Both the conveyance to Stevenson, and the conveyance from Stevenson and his wife, to the Railroad Company, were made subject to the Prior Lien Mortgage of the Railway Company.

That the conveyance from Stevenson and his wife, to the Railroad Company, followed an acceptance by the Railroad Company, of a written proposal by Stevenson, to its Board of Directors, wherein he offered to convey to the Railroad Company, subject to the Prior Lien Mortgage, the properties of the Railway Company purchased by him at the foreclosure sale mentioned, in consideration, among other things, of (1) the assumption by the Railroad Company of the payment of the principal and interest of the outstanding Prior Lien Bonds of $2,000,000.00; and (2) the delivery to Stevenson, or upon his order, of $2,850,000.00 of bonds to be issued under the Refunding Mortgage of the Railroad Company; which offer was accepted by the Railroad Company.

That under date of January 2, 1913, the Railroad Company executed and delivered the Refunding Mortgage. This mortgage conveyed to the appellant, Bankers Trust Company, as Trustee, the

lines of railway formerly owned and operated by the Railway Company; and that among other things it also conveyed all property, which might thereafter be acquired by the use of bonds issued under the mortgage, or their proceeds. That the Fourth Granting Clause of the Refunding Mortgage provided, that it should be a lien on "all real estate, lines of railway, *** engines, cars, *** motive power, rolling stock and equipment, with the appurtenances and franchises thereonto belonging, now appurtenant to the railroads here

above described as being hereby mortgaged, or that may hereafter be acquired by the mortgagor by the use of the gold bonds or their proceeds."

And it was declared therein, that the indenture was and should become and be, a lien upon "all the estate, right, title, interest and property, **now owned** by the mortgagor, or that may **hereafter be acquired by it,** by the use of the gold bonds (when and as any such estate, right, title, interest or property is, or shall be, so acquired,' in and to all or any of the real estate, lines of railway *** engines, cars *** motive power, rolling stock, equipment, appurtenances and other property and franchises hereinbefore described as being hereby mortgaged."

And in reference to the Prior Lien Mortgage, Refunding Mortgage recites: "All the railroads, franchises and other property above described as being now owned by the mortgagor, and as being hereby mortgaged, however, being subject to the Prior Lien Mortgage or Deed of Trust, dated March 1, 1900, executed by the Chicago, Peoria & St. Louis Railway Company of Illinois." And in Section 3 of Article Four, of the Refunding Mortgage, it is covenanted as follows: "All railways *** franchises, and all property of every kind, in respect to the acquisition or construction whereof gold bonds shall be certified and issued as hereinbefore provided, and all railways, franchises and all property of every kind, described in the granting clauses of this identure, the cost of the acquisition of which shall hereafter be re-imbursed to the mortgagor by the issuance of gold bonds, immediately upon the authentication of such gold bonds by the Trustee and without any further

conveyance or assignment, shall become and shall be subject to the lien of this identure as fully and completely as though now owned by the mortgagor, and specifically described in the

granting clauses hereof."

That the Prior Lien Mortgage, conveyed to the appellee as Trustee, all the properties of the Railway Company "as the same are now owned or may hereafter be acquired by the Railway Company;" and the properties mortgaged are described as follows: "Also all other locomotives engines, cars and other rolling stock, equipment *** and all manner of franchises of every kind and description, however derived, and where ever situated, all, and all manner of real estate and interest therein; and all, and all manner of mixed and personal property of whatever nature or description the same may be, at the date of these presents, owned or possesed by the praty of the first part, (the Railway Company) or which may at any time hereafter, during the continuance of this trust, be acquired by the party of the first part for use upon or in the operation of said railways *****. And also all franchises and property, and all rights or interests in franchises or property of every kind and description, real or mixed, and where ever the same may be situated, that may at any time after the date of this identure, be acquired by or for the said party of the first part, relating to said railways, or the use or operation thereof, all of which it is hereby covenanted shall inure by way of accretion to the benefit and advantage of said parties of the second part, trustees, and by way of further and better security hereunder."

And in Article XIX of the Prior Lien Mortgage, it is expressly provided, that "The Railway Company shall be held and construed as including the **lawful successors and assigns of said company,** being the owners for the time being of the premises hereby mortgaged and conveyed."

It is pointed out by the appellant, that "Series A

Equipment" was not acquired by the Railway Company, which executed the Prior Lien Mortgage, but was acquired by the Railroad Company

under the contract of Conditional Sale of "Equipment Series A," dated April 1, 1913; and that since the Refunding Mortgage was executed January 2, 1913, the "Series A Equipment" was after-acquired property. Also, that this equipment was purchased partly from the American Locomotive Company, and partly from the American Car & Foundry Company; and it is insisted, that it was paid for with funds derived by the Organization Committee, from various sources, including cash assessments upon the stockholders of the Railway Company, the sale of certain Prior Lien Mortgage bonds received by Stevenson as purchaser of the properties of the Railway Company, and the sale of Refunding Mortgage Bonds; and that the funds derived from the several sources were mingled, and that the Re-organization Committee in making disbursements drew on this so called common fund. That "Series A Equipment" was purchased by the Re-organization Committee from the American Locomotive Company, and the American Car & Foundry Company, on the condition, that these companies would subscribe for and take over some of the Refunding Mortgage Bonds; and that the American Car & Foundry Company, did afterwards in accordance with the agreement take $42,000.00 par amount of the bonds and paid $30,000.00 therefor and accrued interest; and that the American Locomotive Company in accordance with its agreement in that regard, took $21,000.-00 par amount of bonds and paid $15,000.00 and accrued interest therefor; and that the Re-organization Committee accounted to the Railroad Company for the amounts received from the companies referred to, for the bonds sold; and that therefore the equipment in question was

acquired by the use of Refunding Mortgage Bonds, or their proceeds; or because the cost of acquisition of such equipment, or a part of such cost, was re-imbursed to the Railroad Company by the issuance of Refunding Mortgage Bonds; and that therefore the Refunding Mortgage should be held to have a lien upon the equipment referred to, because it was property 'in respect of the acquistion or construction whereof, gold bonds were certified and issued,' or at any rate, that 'the cost of the acquisition of which

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was re-imbursed to the mortgagor by the issuance of gold bonds.' The Refunding Mortgage specifically limits the lien of the mortgage with reference to after-acquired property to such as "may hereafter be acquired by the mortgagor by the use of the gold bonds or their proceeds." The proofs appear to be clearly to the effect however, that the equipment referred to, was not acquired by the Railroad Company, after the execution of the Refunding Mortgage, by the use of Refunding Mortgage Bonds, or the proceeds thereof, in fact, it clearly appears, that no property of any kind was acquired by the Railroad Company, by the use of Refunding Mortgage Bonds, or the proceeds thereof, after the issuance of the $2,850,000.00 bonds, which the record shows, were directly used in the acquisition of the railroad properties of the Railway Company. Nor was the cost of the acquisition of this equipment re-imbursed to the mortgagor by the issuance of such bonds.

It is also insisted by the appellant, that "Series A Equipment" constitutes appurtenances; and that it is therefore subject to the lien of the Refunding Mortgage, under the Fourth Granting Clause of the mortgage. The appurtenances referred to in this granting clause however, are the appurtenances which were in existence, and held by the Railroad Company, at the time of the execu-

tion of the Refunding Mortgage, which was January 2, 1913; inasmuch, as the equipment referred to, was not purchased or acquired until several months after that time, it could not have been in contemplation, hence could not have been intended to be included within the scope of the clause mentioned.

The Fifth Granting Clause however, expressly mortgaged "All earnings, rents, issues, profits, tolls, interest and other income of the Railways, property and franchises, at any time subject to this identure." And under the latter clause, the lien of the Refunding Mortgage extended to all the rolling stock, including that embraced in "Series A Equipment" for the reasons tersely stated by Judge Taft in Louisville Trust Co. v. Cincinnati I. P. Railway Co. 31 Fed. 699: "Let us recur now to the question left open,—

as to whether the mortgage of the income to accrue from the Railway then existing and owned by the mortgagor, does not include subsequently acquired rolling stock and machinery, used in connection with the Railway, to earn the income, profits and tolls accruing therefrom. I think this must be answered in the affirmative. No tolls or income or profits could be earned from the Railway, without rolling stock and equipment. No mortgage of the income would give the mortgagee the right to take posession of the mortgaged railway upon condition broken, and take and enjoy the income; but no income could be earned without the rolling stock then in use upon the railway. As against the grantor, therefore, it must be taken, that it intended to mortgage with its railway, all the rolling stock owned by it, and used by it, during the existence of the mortgage, from which it would earn an income, subject to the mortgage. This is the effect of Justice McLean's reasoning in Coe v. Pennock 5 Fed. Cas., 1172; and of the case of Pullan v. Rail-

road Co. 4 Biss. 35, Fed. Cas. No. 11, 461. See, also State v. Northern Cent. Ry. Co. 18 M. D. 193."

The appellant contends, concerning the several parcels of land, comprised in "Parcel Twelve—A" described in the decree, that only so much, if any, as was owned by the Railway Company at the date of the Prior Lien Mortgage, March 1, 1900, is subject to the lien of that mortgage; and that the remainder of such properties, is free from, and not subject to the Prior Lien Mortgage, because not used for railroad purposes. That with respect to after-acquired property, the granting clauses of the Prior Lien Mortgage extend to, and covers only, such after-acquired properties as were "acquired by the party of the first part for use upon or in the operation of said Railway," or as were "acquired by or for said party of the first part, relating to said Railways, or the use or operation thereof." But that the properties referred to are subject to the lien of the Refunding Mortgage, whether or not used for railroad purposes, because the equities therein, were owned by the Railroad Company, at the date of the Refunding Mortgage; and because, such

properties, whether or not actually used for railroad purposes, were, and are, appurtenant to the lines of railroads described in the Refunding Mortgage; and that these properties are within the terms and scope of the Fourth Granting Clause, whereby there was conveyed, "all real estate ** now appurtenant to the railroads hereinabove described." The proofs in the record are to the effect, that the real property referred to, which now stands in the name of H. A. Cushing, at the time of the foreclosure referred to, belonged in equity to the Railway Company, at the time of the execution of the Prior Lien Mortgage; and that the Prior Lien Mortgage by its terms expressly covered "all the other property, lands,

tenements and hereditaments of the Railway Company, together with all its choses in action, estates, easements, rights, title, interest, claims and demands in law or in equity." Under this clause the lien of the Prior Lien Mortgage would become effective; whether the real estate in question, was used for railroad purposes or not, and regardless of the fact, that the legal title to the same, stood in the name of some person other than the Railway Company. Moreover, the real estate in question, after the foreclosure sale, was acquired by the Reorganization Committee, through the medium of Stevenson, for the Railroad Company. And is now held in the name of Cushing for the purposes of the Railroad. Concerning the lien of the Prior Lien Mortgage on "Series A Equipment," is may be said, that the scope of the lien of the Prior Lien Mortgage, under the clauses in the mortgage relation thereto, covers all locomotive engines, cars and other rolling stock, equipment, and all machinery, tools, implements, materials, furniture, and all manner of franchises of every kind and description, however derived, and where ever situated; and all manner of real estate, and interest therein; and all manner of mixed or personal property of whatever nature or description the same may be, which was owned or possessed by the Railway Company at the date of the mortgage, or which may have, at any time thereafter, during the continuance of the trust, been acquired by the Railway Company for use upon, or in the operation of the railways involved, or by the "lawful

successors and assigns" of the Railway Company. The description of the property effected would necessarily include "Series A Equipment," if such equipment was acquired by a **successor** or **assign** of the Railway Company, for use upon or in the operation of the railways involved. It is contended by the appellant how-

ever, that the Railroad Company was not the lawful successor of the Railway Company in the operation of the railways in question, because the Railroad Company, which acquired the equipment, was a new, separate and independent corporation, and derived its franchise, not from or through the predecessor company, but directly from the State of Illinois. While it is true, that the Railroad Company was a newly formed corporation, and derived its charter from the State of Illinois, the proof in the record, makes it clear, that the Company was formed, and came into existence by its charter from the State, for the expressed purpose of becoming the successor to, and assign of the Railway Company, in acquiring the properties and operating the railways of the Railway Company. The Railroad Company, was therefore, as a matter of fact, the successor and assign of the Railway Compony; and it was also the lawful successor as a matter of law. Compton v. Jessup 68 Fed. 263.

For the reasons stated, we are of opinion, that the findings of the court concerning the priority of the lien of the Prior Lien Mortgage were correct; but that it should have found also, that the lien of the Refunding Mortgage, attached, as a junior lien, and second to the lien of the Prior Lien Mortgage, to "Parcel 12—A" of the real estate involved. Humphrey v. McKissock 140 U. S. 304; 35 L. Ed. 473. And that, for the reasons stated, the lien of the Refunding Mortgage extended also to the "Series A Equipment," subject to the prior lien of the Prior Lien Mortgage. The decree is therefore reversed in part, and the cause is remanded with directions to modify the decree, in accordance with the views herein expressed; but in all other respects, the decree is affirmed.

Affirmed in part, and reversed in part, and remanded with directions.

235 I.A. 634

General No. 7686 Agenda No. 54

April Term A. D. 1924

Nanta Horn, Appellant

vs.

Omer Arbogast and Rose Patrick, Appellees

Appeal from McLean.

NIEHAUS J.

In this case the appellant Nanta Horn, filed a bill in equity against the appellees Omer Arbogast and Rose Patrick. The bill alleges, that on or about the 5th day of October, 1922, the appellees were partners, and engaged in conducting a restaurant known as the Acme restaurant, in the city of Bloomington, which with the furniture and fixtures, and stocks of foods, and goods then therein, was of value not to suceced $700.00; that the appellee Arbogast, on or about the middle of the month of January, 1923, told the complainant, that he had obtained a decree of divorce from his former wife during the first part of the preceeding month, November 1922; that he desired to, and would marry the appellant, after the expiration of the year following his divorce; and that he also represented to her, that the appellee Rose Patrick, was then his partner in the Acme restaurant business, and was then in love with him; and that it would be impossible for him to marry appellant, and continue in the restaurant business with Rose Patrick; that it was necessary for Arbogast to continue in the restaurant business, in order that he might marry the appellant; and that he would terminate the partnership with Rose Patrick, and marry appellant after the termination of the partnership; that the appellant having full faith in the truth of Arbogast's statements and representations, then and there agreed to marry him; and thereafter relied up-

on and trusted him, and believed that he intended to marry her; that thereafter in the month of February 1923 Arbogast falsely and fraudulently, and for the purpose of obtaining appellant's money, told her, that it would be necessary for her to give him $2000.00

of complainant's savings, in order, that he might use it in buying out the interest of the defendant Rose Patrick in the Acme restaurant; and so he could continue to operate the restaurant business without Rose Patrick; and in order, that he might marry the appellant at the expiration of the year from the time of his divorce; also, that he fraudulently and falsely represented, that the Acme restaurant business with furniture, fixtures and supplies, was worth $2000.00, and was earning large profits; and, that if the appellant would give him $2000.00, he would purchase the interest of Rose Patrick in the business for her, and terminate his partnership with Rose Patrick; and, that he and the appellant would thereafter conduct the business until their marriage, and then thereafter as husband and wife; and that he would teach the appellant the restaurant business, so that she need no longer earn her living by domestic service; that the appellant having full faith in Arbogast's professions of love for her; and believing in his promise to marry her, gave him the $2000.00, to be used by him as aforesaid; that the appellee Arbogast in the month of February, 1923, told appellant, that after he had purchased the interest of Rose Patrick in said restaurant, with complainant's money, and had eliminated said Rose Patrick from said business, that he would then buy back from appellant a one half interest in said restaurant business; that appellant placing trust and confidence in the representations of Arbogast, and being in complete ignorance of the restaurant business, and of the

value thereof, and of the furniture, fixtures and supplies therein, gave Arbogast the $2000.00 in trust, to be used by him in the purchase of said restaurant and furniture and fixtures and supplies then therein, and of the entire interest of said Rose Patrick in said restaurant, furniture, fixtures and supplies, for appellant; and that she received from him an alleged bill of sale, executed by him, and purporting to convey to appellant said restaurant business, including all fixtures, stock and merchandise then and there being used in said business; that the appellee Arbogast then and there told the appellant, that she would go into possession and

become associated with him in the conduct of said business on the Monday following, namely February 10, 1923; but that Arbogast and Rose Patrick, thereafter, and only a few hours later in the afternoon of the 16th day of February, without her knowledge or consent, fraudulently removed fixtures and merchandise from said restaurant of great value, which were included in the bill of sale, and conveyed to her, including canned goods, electric fan, silver ware, knives, forks, spoons, plated ware, sugar, adding machine and other fixtures, furniture and supplies, which had been sold to appellant for said $2000.00; and did not deliver the same to the appellant, when she went into possession of said restaurant and business, on the morning of February 19th. The bill also alleges, that Arbogast with the $2000.00 which he so fraudulently obtained from the appellant, afterwards purchased another restaurant called the Home restaurant, located within three blocks of the Acme restaurant purchased by the appellant, and placed therein the fixtures and merchandise which he had fraudulently removed from the Acme restaurant; and that the appellee Rose Patrick thereupon began to conduct and

operate said Home restaurant business; and that Arbogast, after a few days, joined said Rose Patrick in conducting said Home restaurant; and that they continued thereafter together to conduct and operate the same; and that thereupon and thereafter, the appellees Arbogast and Patrick became and are engaged in attracting away from the appellant and the said Acme restaurant former customers of the Acme restaurant; and serving them at the Home restaurant; and that the appellant is informed and believes and states the fact to be, that the Home restaurant was purchased in the name of Rose Patrick with appellant's money, which Arbogast received from her; and that the appellee Rose Patrick now claims to be the owner thereof. The appellant also avers, in her bill of complaint, that Arbogast did not intend, and never has intended to marry her; but falsely and fraudulently promised to marry her, and became engaged to her, for the purpose of gaining her confidence, and of fraudulently obtaining appellant's $2000.00; and that he had not intended to use said

$2000.00 for the purpose of severing his relations with the defendant Rose Patrick, so that he and the appellant might engage in the conduct of the business of the Acme restaurant, and might become married; that Arbogast did not intend to operate the Acme restaurant with her, as a partner or as her husband; but that he obtained the $2000.00 for the fraudulent purpose of selling the appellant the Acme restaurant business, furniture, fixtures and supplies, worth not over $700.00, for the sum of $2000.00; and that the representations of Arbogast that the Acme restaurant business furniture, fixtures and supplies were worth $2000.00, were false and grossly excessive; that he knew they were false, and that the restaurant and business, etc., was

not worth to exceed $700.00. The bill also alleges, that the appellee Rose Patrick prior to the time that the appellant gave Arbogast the $2000.00 referred to, knew that Arbogast had promised to marry the appellant, and had become engaged to her for the fraudulent purpose of obtaining said $2000.00; and that Arbogast did not intend to marry appellant; and that she knew, that the appellant gave Arbogast the $2000.00 in trust for the purpose of acquiring the Acme restaurant, in order that the appellant and Arbogast might conduct said restaurant and become married; and knew that said Acme restaurant was not of a value to exceed $700.00; and that the $2000.-00 was a fraudulent and grossly excessive price for said business. The bill also alleges, that Arbogast has not conducted said Acme restaurant with her or taught her the restaurant business; but on the contrary, has been conducting the Home restaurant with the defendant Rose Patrick; that she is ignorant of the restaurant business, and unable to porperly conduct and manage the same; and that she has requested the appellee to deliver back to her the $2000.00, and has offered to restore to them, and surrender the Acme restaurant furniture, fixtures, and an equal amount of supplies; and the apepllees and each of them have wholly refused to return or pay the $2000.00 or any part thereof. The bill also avers, that Arbogast received appellant's $2000.00 in trust, and is therefore

liable as trustee, to account therefor; and that the appellee Rose Patrick, did not give any valuable consideration for said Home restaurant, and is not a bona fide owner of the same; and that Arbogast is without pecuniary means or property other than such interest as he may have in said Home restaurant business; and is unable, and without property to answer in damages to

complainant for his fraud deception and misrepresentations. The bill prays, that the sale to the appellant may be decreed to be unlawful, null and void, and to be set aside; that Arbogast be held to have received the $2000.-00 as trustee for the appellant; and that the court follow the $2000.00 as a trust fund to its investment in the Home restaurant business; and impress the Home restaurant business with a trust charge, to secure the re-payment to the appellant of the $2000.00 and interest; and that Arbogast's interest in said Acme restaurant, may be impressed with a trust charge, to secure the repayment to appellant of said $2000.00 and interest; and that Arbogast be decreed to account for and repay said $2000.00 to appellant with interest; and that in default of such repayment that the Home restaurant business, and the Acme restaurant, be sold and the proceeds thereof applied on said payment. The bill also prays for an injunction, and a receiver, and such further relief as equity may require.

The apppellees demurred to the bill of complaint, and the demurrer was sustained; and a decree entered dismissing the bill for want of equity. This appeal is prosecuted from the decree.

It is evident, that the bill was filed on the assumption that the $2000.00, which it is alleged that Arbogast obtained from the appellant, was a trust fund resulting from the transactions between the parties with reference thereto; that a fiduciary relation existed between the parties with reference to the use and purpose of the fund. The averments in the bill of complaint, in reference to the transactions between the parties, and with reference to the $2000.00, are clearly to the effect, that the money was obtained by Arbogast by fraud; and that the appellant was

cheated out of it by Arbogast, by making a false promise to marry her, and by other false representations, with reference to the value of the restaurant and the property connected therewith; and fraudulently withholding from her a part of the property purchased and ambraced in her bill of sale; and by the failure of Arbogast to keep his promise to become her partner in the restaurant and business purchased by her. It is evident that the $2000.00 was not a trust fund; and that the law gives a complete remedy for the wrongs charged in the bill to have been committed by Arbogast. There is a remedy at law for obtaining the money or property by fraud or false representations; and for wrongfully withholding property which belongs to another, and for damages incurred for a breach of a contract or of a promise of mariage. The subject matter of this suit therefore comes under the jurisdiction of a court of law, and not of a court of equity. We are of opinion, that the demurrer to the bill was properly sustained; and the decree dismissing the bill for want of equity is therefore affirmed.

Affirmed.

39752

235 I.A. 634

General No. 7687 Agenda No. 75

April Term A. D. 1924

Indian Refining Company, a Corporation, Appellant

vs.

John Barton Payne, Agent and Director General of Railroads (James C. Davis substituted defendant,) Appellee

Appeal from McLean.

NIEHAUS J.

In this case the appellant, Indian Refining Company, brought suit in the circuit court of McLean County against John Barton Payne, Agent and Director General of Railroads, (for whom James C. Davis was afterwards substituted as defendant,) to recover damages for the loss of a part of the contents of a tank of gasoline, which had been carried by the Chicago & Alton Railroad from Lawrenceville, Illinois, to Bloomington, as an intra state shipment.

The appellant in its brief, makes the following statement concerning its claim for damages, as set out in the declaration, the pleading and the issues involved, and the final result of the controversy:

The declaration consists of three counts. The first count avers a loss either before or after the termination of the defendant's liability as carier, charges specific negligence on the part of defendant in striking the tank car with other cars; and avers freedom from contributory negligence. The second and third counts cover loss before the termination of the defendant's liability as common carrier. The second count averring a negligent loss and failure of delivery; and the third count alleges loss of the gasoline while in the defendant's possession as carrier, and counts upon the defendant's failure to deliver, and upon its liability as insurer.

To the original count apepllees pleaded the general issue. To the second, the general issue, and a special plea combining a traverse with a confession and avoidance by setting up, that the gasoline had been delivered; and attempting to excuse the loss by pleading the provisions of a lease covering the tract of ground leased to appellant for its receiving tanks and pumps and ending with a verification. To the third count appellees pleaded a common traverse denying failure to deliver and concluding with a verification. A jury was waived. The Court took appellant's general and special demurrer to the special plea and the traverse

ending with a verification under advisement, sustained the demurrers and entered judgment for defendant.

The trial court in passing upon the merits of the controversy, reached the following conclusions as to the facts disclosed by the evidence, and of the law pertaining to the case:

The third plea is no answer in law to the original declaration under Owen & Co. vs. Mich. Central Ry. Co. 291 Ill. 149, nor is it a proper plea to the additional counts. Under the evidence the lease has no application.

A common carrier is an insurer of goods entrusted to him and accountable for the loss thereof or any damage thereto unless shown to have happened by the act of God or the public enemy or to have been occasioned by an act of the shipper or some one in his position.

In my opinion that is the law whether it is so stated or not in the bill of lading. In the case at bar the bill provides:—"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the Act of God, the public enemy, quarantine, the authority of law,

or the act or default of the shipper or owner." As no objection was made to the provisions of the bill of lading in accordance with Sec. 10 of the Uniform Bill of Lading Act, it should be given full force and effect, Bean vs. Jackson, 207 App. 577.

A common carrier is not exempt from liability for a loss occasioned by an Act of God if the carrier has been guilty of any previous negligence which brings the property in contact with the destructive force or unnecessarily exposes it thereto. Wald vs. P. C. C. & St. L. R. R. Co. 162 Ill. 545.

Some courts hold that the same rule applies where the loss is caused by the combined negligence of the carrier and the owner. Other courts hold that if the loss or injury is caused by the negligence of the carier and that of the owner, there can be no recovery. Short vs. Oregon Short Line R. R. Co. 190 App. 25; Southern Ry. Co. vs. Forgery & Richardson, 54 S. E. (Va.) 477.

Where loss or damage is caused by the negligence of the shipper in loading the car the carier is relieved from liability unless it knew or could have known of the defective loading. Penna. Co. vs. Kenwood Bridge Co. 170 Ill. 645; Libra vs. C. C. C. & St. L. Ry. Co 202 App 418; Keystone Oil & M. Co. vs I. C. R. R. Co. 207 App 243.

The carrier is exempt from liability when the loss is caused by the negligence of the owner or his servant. Minnelee vs. St. Louis I. M. & S. Ry. Co. 129 S W. 762, or by the act of owner or his servant without negligence. Hart vs. C. & N. W. Ry. Co. 29 N. W (Iowa) 597.

Many other cases might be cited to show that there can be no recovery where the loss is caused by the act or negligence of the owner while the property is in the hands of the carrier and before it has been delivered to the consignee. It does not look reasonable to me that a carrier should be held liable for a loss occasioned by the

act or negligence of the owner or his servant.

If the gasoline had been lost because Ridgway was guilty of negligence in failing to properly connect the drain pipe and without the tank car having been moved no one would seriously contend that defendant should be held liable even though its duty as a carrier had not ceased at the time of the loss.

Page 2

Ridgway knew that cars were often placed on this spur and taken out besides those that were for the plaintiff. While there is some controversy as to whether the accident occurred during daylight or after dark, yet it clearly appears that it was after usual business hours and at a time when defendant's servants had no reasonable cause to believe that the car was being drained.

If Ridgway had been killed or injured while he was under the tank car conecting the drain pipe the undisputed facts would defeat a recovery as a matter of law because of a lack of negligence on the part of the defendant. C. & A. R. R. Co. vs. Pettit, 209 Ill. 452

The evidence is wholly insufficient to show that defendant's servants were chargeable with notice that Ridgway was engaged in draining the tank car at the time in question. In the absence of such notice it can not be said that it was negligence for them to move the cars which struck the tank car. C. & A. R. R. Co. vs. Pettit, supra. But in the most favorable view of the evidence for the plaintiff it must be held that its servant was guilty of contributory negligence and it would be inequitable to allow a recovery. Short vs. Oregon Short Line R. R. Co. supra; Southern Ry. Co. vs. Gorgey & Richardson, supra.

In Owen & Co. vs. Mich. Central Ry. Co. supra there was no claim or pretense that the loss was occasioned by any act or negligence of the owner.

Demurrer sustained to third and fourth pleas. The Court finds the issues for the defendants. Judgment on findings.

In the conclusions reached by the trial court we fully concur; the judgment is therefore affirmed.

Affirmed.

General No. 7696 Agenda No. 60

April Term A. D. 1924

Hotz Lumber Company, Appellee

vs.

Josephine Deambrogio, Executrix of the Last Will and Testament of Louis Deambrogio, Deceased, et al. Appellants

Appeal from Macoupin.

NIEHAUS J.

In this case, a petition for mechanic's lien was filed in the circuit court of Macoupin County, by the appellee, Hotz Lumber Company against Louis Deambrogio. After the filing of the petition, Louis Deambrogio died; and his widow, as executrix, was substituted as party to the suit. The lien claimed by the appellee, is based on Sections 21 and 24 of Chapter 82 of the Mechanic's Lien Act. The petition was referred to the master in chancery, who heard the evidence, and thereupon made a report finding, that the appellee was entitled to a merchanic's lien. Objections were filed, and exceptions taken, to the report of the master; and upon the hearing before the court, the exceptions were overruled; and the court entered a decree confirming the report. Louis Deambrogio was the owner of the premises described in the petition; and had entered into contract with one R. D. Bell for the erection of a building on the premises; and Bell the contractor entered into an oral contract with the appellee, to furnish all the building materials and supplies handled by them for said building; and that the appellee was to receive payment therefor on demand, not later than the completion of the building; that in accordance with the contract, building material for the construction and completion of the building was delivered at different times by the ap-

pellee to the value of $1759.50; that on or about February 10, 1920, Bell abandoned the contract, and refused to complete the work. The master found, that the petitioner within sixty days after the completion of its contract, served notice on

Deambrogio in compliance with the statute; and that the appellee was entitled to a lien for the sum of $1759.50, plus interest in the sum of $290.70, making the total amount due $2054.20; and that the appellee was entitled to a decree for a lien for that amount against the appellant, Josephine Deambrogio, as executrix.

It is urged on apepal, that the appellee did not give the sixty day notice required by Section 24 of the mechanic's lien Act. Whether the notice given Louis Deambrogio, the owner, was given within sixty days after the completion of appellee's sub contract for materials, depends upon whether the last shipment of material, consisting of six sacks of cement, was a part of his contract; and was delivered to the owner or contractor. The evidence shows, that the six sacks of cement, were to be used for stucco work in finishing the porch on the building, which was still unfinished at the time of the shipment of the cement. The evidence also shows, that the contractor was still connected with the job at that time. He testified, that he took charge of the shipment at Wilsonville, and had it hauled to and placed upon the premises for the puropse indicated; and the cement was never returned to the appellee. Under this proof, the requisites of the statute concerning delivery and notice are sufficiently established. The decree is therefore affirmed.

Affirmed.

3977a

235 I.A. 634

General No. 7705 Agenda No. 6

April Term A. D. 1924

Liberty State Bank, Appellee

vs.

Louis G. Deschler Co., Appellant

Appeal from McLean.

HEARD, J.

Appellant conducted a cigar and tobacco business in the building No. 119 North Main street, Bloomington, Illinois under a lease which expired July 1st, 1920. The building belonged to the estate of M. Marblestone, a deceased resident of Cincinnati, Ohio. Daniel and Cora Segal were executors of Marblestone's last will and testament and trustees in control of the property with local agents by the name of Griesheim at Bloomington.

September 19, 1919 the Segals as executors and trustees, leased in writing the premises in question to appellee for a term of ten years from July 1st, 1920. Appellant refusing to deliver possession of the premises to appellee, upon the termination of the lease, July 1, 1920, after written demand a suit in forcible entry and detainer was brought before a Justice of the Peace in which suit a judgment was rendered by the Justice of the Peace in favor of appellee against appellant. From this judgment an appeal was taken to the circuit court where, after a trial, a like judgment was rendered. From this latter judgment an appeal was taken to the appellate court of the third district of Illinois where on April 22nd, 1922 the judgment of the circuit court was affirmed. (Liberty State Bank v. Deschler 225 Ill. App. 388.) Thereafter on May 7, 1922 Appellant vacated the premises in question.

Appellee has brought this suit against Appellant under sec. 2 chap. 80 Rev. Stats. Ill. for double the yearly value of the premises in question from July 1, 1920 to May 7, 1922.

Appellant limited its appearance, filed a plea to the jurisdiction of the court, alleged facts showing that it is a resident of Indiana and was not found in McLean County. Issues were formed, a jury waived, and the trial court at the February term, 1923, after hearing the evidence found the issues in favor of Appellee. Thereupon Appellant filed a plea of **nil debit** and the trial resulted in a verdict at the April, 1923 term in favor of Appellee for $9,236.10 upon which verdict judgment was rendered. An appeal was taken to the Supreme Court, Appellant claiming that a constitutional question was involved,

but since no constitutional question appeared on the face of the record the appeal was transferred to this court.

When the bill of exceptions was presented for the signature of the trial Judge he refused to sign as presented and properly ordered pages 1 to 88 inclusive omitted from the record upon the ground that the matter therein contained should have been incorporated in a bill of exception during the February term or at a time thereafter fixed by the court during said term, and that no order extending the time for filing such bill had been entered at such term.

Just what Appellants defense was in the former suit does not apepar as the briefs and arguments of the parties in the former case were not admitted in evidence, but it does appear in evidence from the opinion of the Appellate Court that one of the defenses was that Appellant was claiming the right to withhold the possession of the premises by reason of an alleged contract of leasing for a period of ten years from July 1st, 1920, and that this claim was held invalid.

In the present case Appellant attempted to defend upon the ground that it withheld the possession of the premises during the

period in question under a bona fide claim of right, and that prior to the time of so withholding possession of said premises it had sought the advice of an attorney at Bloomington who had advised Appellant not to give up possession of the room but to remain there and that Appellant "could win it in court," but the court sustained objections to all attempts of Appellant to introduce evidence along this line.

The section of the statute under which this action is brought does not provide a penalty for a mere holding over after the expiration of the tenancy, but only provides for such penalty where such tenant holds over wilfully.

In Stuart v. Hamilton 66 Ill. 250 it is said: "The courts have held that where the lease had expired according to its terms, the holding over, altough intentional is not within the statute unless it was knowingly and wilfully wrongful; that where the tenant continued to hold over under a reasonable belief that he was doing so rightfully he does not incur the penalty."

In Odian Coal Co. v. Denman 185 Ill. 413 it is said: "As used in criminal or penal statutes the word wilful has frequently been interpreted to mean not merely a voluntary act but an act committed with evil intent.

In 16 R. C. L. 1171 it is said: "To render the ten-

ant liable to the statutory penalty the holding over must have been wilful, and without color or title, and therefore if the holding over is under a bona fide claim of right based on reasonable ground he can not be held liable for the penalty."

In order for Appellee to recover in this suit, assuming that it has a legal right to bring this suit, it must prove something more than a mere intentional holding over by Appellant after the expiration of the terms of Appellant's lease. It must also show such a state of facts as will show that it is entitled to bring the suit and that Appellant wilfully, as the term wilfully is herein defined, held over after the expiration of his lease. This

Appellee failed to do.

At the request of Appellee the court gave to the jury the following instruction:

"The Court instructs you that the defendant had no right in law to occupy the building in question after June 30, 1920, and the occupancy by the defendant of said building after said time, and after written notice of demand for the possession of the same, if you believe from the evidence that said such written notice was given to the defendant, was unlawful and without right."

This instruction under the circumstances of this case could not fail to mislead the jury and its giving was therefore reversible error.

This case seems to have been tried upon the theory that because Appellant's contentions were not upheld by the Appellate Court in the forcible entry and detainer suit, that the holding over was therefore wilful. This is not necessarily true. (Strimple v. P. P. Co. 187 N. W. 1001.) Appellant had a right to introduce in evidence what his claim of right was in that case and any other evidence such as the advice of counsel, which might tend to show that the holding over was not wilful and had a right to have the jury instructed in accordance with the views herein expressed. The judgment of the circuit court is reversed and the cause remanded.

3978a

235 I.A. 635

General No. 7729 Agenda No. 24

April Term, A. D. 1924

Chase Harding, Appellee

vs.

Allith-Prouty Company, a Corporation, Appellant

Appeal from Vermilion.

HEARD, J.

This is an appeal from a judgment for $2,440.00 and costs of suit rendered by the Circuit Court of Vermilion County in favor of Appellee against Appellant.

This suit was based on a trade acceptance, or bill of exchange, in the sum of $2,216.50, dated August 2, 1922 payable October 31, 1922, and the declaration alleges that said bill of exchange was drawn by the H & D Company, an Indiana corporation, on August 2, 1922 and was accepted by Allith-Prouty Company, an Illinois corporation; that the H & D Company for value received assigned said trade acceptance to the First National Bank of Crawfordsville, Indiana; that afterwards on March 24, 1923, the First National Bank of Crawfordsville, Indiana, assigned said trade acceptance to Appellee; that Allith-Prouty Company, an Illinois corporation, changed its name to Danville Manufacturing Company, and Appellant, a Delaware corporation, purchased the assets of the Allith-Prouty Company, an Illinois corportion, and assumed and agreed to pay the trade acceptance.

Appellant filed several pleas by which it was set up that the H & D Company on July 17, 1921, made an agreement with the Allith-Prouty Company, an Illinois corporation, by which it sold certain material and parts on hand for the manufacture of shock absorbers, and the right to manufacture and sell such shock absorbers; that on February 13, 1922 a supplemental agreement was entered into between the same parties, whereby the acceptor of said instrument agreed to accept such an instrument as should mature on August 2, 1922; that the acceptor did accept such negotiable instrument which became due on August 2, 1922; that by the supplemental agreement of February 18, 1922, it was agreed that the final trade acceptance, that is, the one maturing August 2, 1922, should be paid at its maturity only provided all the raw materials and parts sold by the party of the first part to the party of the second part should have been used, but if more than one-third (1-3) of said raw

materials and parts should, at the time of maturity of the said final trade acceptance, not have been used, then such portion of said trade acceptance as represents the balance of said raw material and parts not then used should be renewed from time to time until the same should have been substantially used; for that portion used party of the first part should pay in cash; for that portion unused new trade acceptance should be executed and accepted from time to time; that the trade acceptance sued on was on the day of its date accepted by the acceptor as a renewal of the said negotiable instrument which matured on August 2, 1922, as aforesaid; that said negotiable instrument sued on was accepted in accordance with the terms and agreements of

February 18, 1922; that the drawer of the instrument sued, sold to the acceptor thereof, in pursuance of the first contract above mentioned, 69,600 items of the value of $4,498.23; that there remained unused in the possession of the acceptor on October 31, 1922, of such materials and parts 39,958 items of the value of $3,328.44; that on April 2, 1923, the acceptor of the instrument sued on transferred all its right, title and interest in the aforesaid contracts and material above mentioned to defendant; that of said material and parts so sold by the drawer of said instrument, there remains on hand at this date 36,958 items of the value of $3,328.22; that at the time of the maturity of the negotiable instrument sued on more than one-third (1-3) of the raw material and parts had not been used by the acceptor of said negotiable instrument, and that negotiable instrument is not due and payable; that the plaintiff at the time of making the written contract aforesaid, was the secretary of the payee in said negotiable instrument, and as such secretary signed said contract on behalf of said corporation, and had full knowledge of all provisions of the contract and of the rights of the defendant thereunder; that at the time plaintiff acquired said note he was an officer and agent of the payee and acted for and in behalf of the drawer, and took said instrument subject to all defenses existing between the maker and the payee.

There is no question in the case but what the supplemental agreement above mentioned was entered into between the parties and that Appellee had knowledge of such an agreement, therefore constituting a proper defense to the suit if the facts set up in the plea were substantiated by the evidence. If on August 2, 1922 more than one-third (1-3) of the raw

material and parts had not been used by the Allith-Prouty Company, then it and Appellant, who assumed its indebtedness on that date, had a right to have the trade acceptance renewed in accordance with the supplemental agreement.

The only evidence bearing on this question is that of Joseph A. Leeby who was production manager with the Allith-Prouty Company, an Illinois corporation, who counted the material when it was delivered to the Allith-Prouty Company and made a list of the parts in detail, which list was introduced in evidence showing an aggregate of $4,498.23 worth of parts received, and also made a list of the parts on hand August 2, 1922 which showed that on that date the Company had on hand $3,328.44 worth of parts. On cross examination, however, he testified that the items mentioned in the list totaling $4,-498.23 was not all of the materials and parts that the Allith-Prouty Company originally got from the H & D Company, that the other items, materials and parts that were consigned, were not listed in this list.

There was, therefore, no evidence in the record that on August 2, 1922, or at any later date that more than one-third (1-3) of the materials and parts mentioned in the supplemental agreement were on hand and not used. It was not sufficient to entitle Appellant to a extension of time of payment to show that more than one-third (1-3) of the parts were on hand, but it was also necessary to show that more than one-third (1-3) of both the material and parts remained before there was a right to a renewal.

The judgment being sustained by the evidence in the case is therefore affirmed.

3979a

235 I.A. 635

General No. 7747 Agenda No. 33

April Term A. D. 1924

E. S. Lyons, Appellant

vs.

Peoples Bank, Inc., of Lexington, Illinois, Appellee

Appeal from McLean County Court.

HEARD, J.

In this case Appellant has filed what purports to be an abstract of the record, but it falls far short of a compliance with the rules of this court. It fails to show what the issues were, while it shows that there was a verdict for defendant, the record does not disclose who was the plaintiiff nor who was the defendant. It does not show what the judgment of the court was. The abstract is not indexed in accordance with the rules and in other respects it is insufficient. This court has often said that while it will search the record for the purpose of affirming the case it is not its duty to go behind the abstract and search the record for the purpose of reversing the case. This case could therefore be affirmed **pro forma** for failure to file a proper abstract.

As we gather the material facts in the case from Appellant's brief and argument they are that: W. T. Lyons on Sept. 15, 1923, then a resident of Money Creek Township in said County, and State, executed a note for a consideration of $1305.00 payable to the order of E. S. Lyons, appellant, falling due March 1, 1924, and at the same time and place executed a chattel mortgage upon his interest in the growing corn on the farm of Brown Sisters in Money Creek Township aforesaid to secure the payment of said note and acknowledged the same before T. F. Kennedy, a justice of t he peace, in and for the Township of Martin, McLean County, Illinois. Said mortgage was on the 15th day of Sept., 1923, acknowledge and re-

corded by the said justice upon his docket and on the same day it was recorded with the Recorder of Deeds of McLean County, Illinois. The mortgage contained an insecurity clause and there was a balance due on said mortgage note of $1235.96.

Appellee, Peoples Bank of Lexington, Inc., levied an execution upon the property pledged by the said mortgagee on Nov. 19, 1923, and thereupon the mortgagee served notice upon the Sheriff for a trial upon the rights of property. Said execution issued upon a judgment by confession taken against W. T. Lyons in the Circuit Court

of McLean County, on Nov. 2, 1923.a

The Sheriff of said county levied the said execution upon the property of the defendant and made the original service on that same day. Said levy was made on "all of the corn in cribs belonging to defendant on farm known as the Brown Sisters farm located in Money Creek Township, McLean County, Illinois." Said levy was made on Nov. 19, 1923, and no other property of W. T. Lyons was levied upon.

On the 20th day of Nov. 1923, notice was served according to law, upon the Sheriff for a trial of the rights of property; that thereupon the attorneys for the Appellee entered the appearance of the Appellee. On the same day and date the mortgagee served notice of foreclosure and posted notices of sale.

The defendant W. T. Lyons, in execution scheduled against the execution served upon him on the 19th day of Nov. 1923, and filed such schedule with the Sheriff on the same day, viz: Nov. 22, 1923, and before the trial of the rights of property had on Dec. 10 and 11, 1923.

Appellant contended that this case puts in issue, FIRST, the validity of the acknowledgment of the chattel mortgage in question, SECOND, whether or not the plaintiff in execution lost its lien by

its delay in pursuing its remedy at law to subject the property to sale to satisfy the judgment, and, THIRD, by failing to have an appraisement made before the trial of the right of property.

W. T. Lyons, the mortgagor, was a resident of Money Creek Township at the time of the execution of said chattel mortgage, and the acknowledgment of the mortgage was taken before a justice of the peace, in and for the township of Martin. In Watkins v. Dunbar No. 7650 and National Loan Co. vs. Jones 7637 this court at the October, 1923, term, after a lengthy discussion of the question, held that a chattel mortgage, acknowledged by a resident of one township before a justice of the peace of another township in a county under township organization, was invalid as against creditors of the mortgagor. The lien of Appellee by virtue of its execution was superior to that of Appellant under his mortgage, on the property in question.

While it is said that the mortgagor gave to the Sheriff a schedule, yet the schedule is not set out in the abstract so that it does not appear from the abstract that it was such a paper as would call upon the Sheriff to have an appraisement of the property made even if it

were incumbent on him to have an appraisement made prior to the trial of right of property where a valid schedule was submitted to him in which the debtor claimed his exemptions. The judgment of the County Court is therefore affirmed.

3780

General No. 7752 Agenda No. 36

April Term A. D. 1924

W. F. Binder, Appellee

vs.

Amos VanHook, Appellant

Appeal from the Circuit Court of Logan County.

HEARD, J.

This is an appeal from a judgment for $750.00 damages is an action on the case brought by Appellee against Appellant.

It is contended by Appellant that the evidence in the case is manifestly against the weight of the evidence. There was evidence in the record fairly tending to prove Appellee's case. The question involved was a question of fact which was peculiarly a question to be determined by the jury and they having found in favor of Appellee, we would not be justified on the record in this case of disturbing their finding on the ground that it was so manifestly against the weight of the evidence that it was the result of passion or prejudice or a misconception of the nature of the case.

Complaint is made of two of the instructions given to the jury at the request of Appellee. While these instructions were perhaps inartificially drawn, yet the statements contained in them are not incorrect statements of the law, and if anything are more favorable to Appellant than to Appellee.

Finding no reversible error in the record the judgment is affirmed.

3981a

General No. 7754 Agenda No. 38

April Term A. D. 1924

James S. McRoberts, Plaintiff, Appellee.

vs.

The Combination Fountain Company, a corporation, Defendant, Appellant.

Appeal from Macon.

HEARD, J.

This is an appeal from a judgment of the circuit court of Macon County in favor of Appellee against Appellant for the sum of $5531.94.

The suit grew out of a sale of stock in the Appellant company to the Appellee in which Appellee claimed the financial condition of the company, on July 1, 1920, was misrepresented to him at the time of purchasing the stock.

The Appellant Company was organized in 1903 with a capital stock of $30,000.00, which was increased in 1915 to $200,000.00, and was subsequently increased to $300,000.00.

About August 1920, it was decided by Appellant to sell $100,000.00 of its stock to the public, and an application was made to the Secretary of State for leave to sell the $100,000.00 worth of stock, and N. L. Rogers, a stock salesman, was engaged for the sale of the stock. Rogers prepared a circular respecting the stock proposed to be sold which he put out under the name of N. L. Rogers Sales Organization, in which appeared a financial statement

of the company as of July 1, 1920.

In the latter part of September, Rogers approached Appellee with a view to sell him stock in the Appellant's Company. A number of interviews were had in one of which Rogers handed Appellee a copy of the circular above mentioned and called Appellee's attention to the various statements contained in it. The result of the negotiation was that Appellee finally agreed with Rogers to buy twenty shares of the stock and to pay for it by turning over Liberty Bonds at par in the sum of $2000.00. He signed a stock subscription and received a receipt for it. The Liberty Bonds were, however, worth only $1950.00, so that when a settlement was made Appellee gave his checks aggregating $1950.00 and retained his Liberty Bonds. A certificate for twenty shares of stock was mailed to him. Rogers afterwards tried a number of times to sell Appellee more stock. Finally Rogers

told Appellee that he was going to make an application to the Secretary of State for leave to sell stock at $125.00 instead of $100.00 a share, and if Appellee would put up the money to buy stock at par he, Rogers, would let Appellee hold the stock as collateral and would resell it within a limited period at $125.00, and the two of them woud divide the profit half and half and an agreement in writing was entered into between them. The second transaction was consummated on October 22, 1920, at which time Appellee signed a subscription for thirty shares of stock, Appellee and Rogers signed an agreement concerning the resale of the stock, and Appellee gave Rogers his check in the sum of $550.00 and Liberty Bonds of the par value of $2450.00. The cash value of the Liberty Bonds was $2225.00. Shortly afterwards a certificate for thirty shares of stock was delivered to Appellee.

The misrepresentation alleged to have been made by Appellant to Appellee are set out in the declaration as follows:

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That the defendant was doing a large and lucrative business; that its business was growing so fast it needed additional working capital to take care of it; that its net profits for the year ending June 30, 1920, was $99.198; that its total assets were $832, 802.37; that its total liabilities were not to exceed $525,404.37; that of this sum $240,000 was represented by notes due in five years: that its net worth was $307,398; that the book value of its stock was $125 a share; that it had $230,655.67 in notes receiveable; that it had $301,614.46 in accounts receivable, all due from trade debtors; and all notes and accounts were good and collectable; that none of the notes or accounts were pledged, discounted or assigned; that it had a capital stock of $500,000 of which $208,000 was outstanding; that it had $285,000 in treasury stock; that it was selling $100,000 of this treasury stock which would be sufficient to take care of its needs for more working capital; that since July 1, 1920 (the date on which the condition of the company was given) it had increased its assets, decreased its liabilities; and was in a better financial condition.

Appellee testified to receiving from Rogers the printed circular mentioned above and that in making the purchase of stock he relied on the representations contained therein. This circular contained among other statements the following:

"The above offering is made for the purpose of increasing the working capital so as to expand the manu-

facturing facilities along exactly the same lines as used at present to take care of more offered business and pay off current indebtedness."

"ASSETS: The financial statement as of July 1st,

1920, the beginning of the 1920-21 year's business, after giving effect to this financing and allowing for depreciation showed NET tangible assets on that date amounting to $381,398.00, which equaled a book value of $123.75 per share, this without giving any valuation to patents, trade-mark or good will.

EARNINGS: Good dividends, both cash and stock, have been paid by the Company since organization, at the same time much of the profits have been put back in the business to increase working facilities. In their fiscal year ending June 30th, 1920, the Company earned $99,198.00, which is equal to over 47% on the total stock then outstanding, and equal to over 32% on the total stock then outstanding plus this issue."

"The purpose of this issue is to increase our working facilities without the addition of more buildings by simply enabling us to carry the financial burden which more business will entail; increase our working capital so as to expand our manufacturing facilities along exactly the same lines as used at present, in that way taking care of this increased offered business; and pay off current indebtedness."

The financial statement of the affairs of the Appellant Company which was made a part of this circular itemizes the assets of the company and gives the total amount of assets at $907,802.37. It also itemizes the liabilities of the company as of that date at an amount of $99,198.00 less than the amount of assets.

Much evidence was introduced in the case bearing upon the financial condition of the company on July 1, 1920. That on the part of Appellee tends to show that the assets of the company on that date would not amount

to $907,802.37, but to a much lesser sum, and Appellee's evidence also tends to show that if on July 1, 1920, the company had any surplus at all it was not a very much lesser sum than $99,198.00.

If Appellee's evidence is true then Appellee's purchasing the stock in question was the result of his relying upon misrepresentations which had been knowingly or recklessly made to him. Whether or not this evidence was true was a question of fact for the jury which we would not be justified in overriding.

It is contended by Appellant that Appellee by voting his stock at a stockholders meeting on February 26, 1921,

by delaying for more than two years to rescind, in instituting a suit finally for damages for deceit, his later abandonment of such course of action, and filing a count for rescission of his purchase of stock and the recovery of the purchase price, he is estopped from rescinding his purchase of the stock and precluded from a recovery in this suit. It is true that Appellee gave a proxy which was voted at the stockholders meeting February 26, 1921, but he testifies that at that time he did not have knowledge of the financial condition of the company or that the statements contained in the circular were untrue.

It is undoubtedly the law that one who seeks to rescind a contract on the ground of fraud must act promptly, and must do no act which will amount to treating the contract as valid after he has ascertined that his assent to the contract has been fraudulently obtained, but must make his election to rescind the contract promptly after acquiring this knowledge. Huiller v. Ryan, 306 Ill. 88. It is also true that until one is in full possession of the facts he is not estopped by

any conduct on his part. Quick v. Nictche, 139 Ill. 262. It is also a rule of law that one who by misrepresentation has induced another to act to his prejudice cannot impute negligence to the latter because of his reliance upon the former's misrepresentation. Carver v. VanArsdale 312 Ill. 220. We cannot hold as a matter of law under the evidence in this case that by his acts, Appellee is estopped from recovering in this suit. Complaint is made of the giving to the jury of an instruction as follows:

"In a civil action like the one at bar the party alleging fraud is not bound to prove its existence beyond a reasonable doubt. It will be sufficient if the fact is established in the minds of the jury by the weight and preponderance of the evidence only. It is not necessary that the proof should be such a character as would warrant the conviction of the defendant in a criminal prosecution for false and fraudulent representations." While techinically this instruction is incorrect in not limiting the proof of fraud to the fraud alleged in the declaration, yet it was simply an instruction stating the degree of proof required and did not direct a verdict, and when taken in connection with the instructions given to the jury on behalf of Appellant it could not have misled the

jury. Complaint is made of the refusal of the court to give certain instructions on behalf of Appellant, but we are of the opinion that the material points of law stated in those instructions were contained in other given instructions.

Finding no reversible error, the judgment of the circuit court is affirmed.

235 I.A. 635

Gen. No. 7680 Agenda No. 1

April Term, 1924

Vespasian Warner, Appellee
vs.
J. Howard McKinney, William Matthews, and A. H. Smith, Commissioners of the Barnett Special Drainage District in the County of DeWitt, and State of Illinois.
Appellants.

Appeal from DeWitt County Circuit Court.

SHURTLEFF, P. J.

Appellee filed a petition in the Dewitt County Circuit Court to the January Term, A. D. 1921, for a writ of mandamus to be directed to the respondents as commissioners of the Barnett Special Drainage District of the County of DeWitt, commanding them forthwith to determine upon some sufficient sheme or plan of altering changing or enlarging the tile drains of said district or of constructing ditches or new tile drains which will afford sufficient drainage for the lands of the petitioner; also, to levy an assessment upon and against the lands embraced in said district for the purpose of raising a sufficient sum of money with which to pay the cost of said alteration, change, enlargement or remaking of said scheme of drainage; and that the said commissioners be directed to provide ample and sufficient drainage for the lands of the petitioner and other lands in said district needing additional drainage.

It was hown that the district was organized on the 5th day of September, A. D. 1908; that it contains about 4,241 acres of land described in the petition. The petitioner's lands are described.

The petition avers that on the 17th day of August, 1911, certain lands of said district were organized under what is known as lateral "C" of said district, and petitioners's lands in said lateral "C" are described.

The petition avers that the commissioners caused to be constructed pursuant to scheme of drainage, located and advised by the surveyor employed by them for such purpose, drains and various sizes of tiles used for the drainage ditches in both the main tiles and in lateral "C".

The petition avers that certain inlets were placed in the main tile and in lateral "C" near the lands of the petitioner and that said inlets admit a large flow of water from the surface into said tile drains and also admit a large flow of water from said tile drains to and

upon the surface of the ground; that the petitioner's land on the northwest is low and flat and needs adequate drainage; that the lands located west of the petitioner's lands are progressively higher than the petitioner's lands and that the surface water of said lands drains rapidly upon the lands of the petitioner through said tile drains and by means of the inlets described, and that the tile drain of said district leading from the petitioner's lands to the outlet of said district is insufficient and inadequate in capacity to carry off the water falling and accumulating upon the lands of the petitioner and upon lands of others in said district similarly situated.

It was shown that substantially all of the lands in the district naturally drained to the northeast along a natural depression (water course) before said district was orgainzed, and that the lands if the petitioner drained through such natural depression before the district was organized, and petitioner claimed that such natural drainage was much better for his lands than the present system of drains.

The petitioner claimed and offered testimony tending to show that a complete and ample system of drainage could be adopted by the construction of an open ditch from petitioner's lands to the outlet, or by constructing additional drain tile of such capacity as would carry off the water accumulating in said district. It was shown that complaints had been made by the petitioner to the respondents of the defect in drainage, and that respondents had neglected and failed to repair the same.

It was shown that the main drain tile of the district was installed and completed about December 1, 1919, and that lateral "C" was installed and completed about October 11, 1912.

The answer of the respondents admits the matters set up in the petition as to the formation of the district and generally the allegations of the petition, except respondents state that in times of moderate or great rainfall large quantities of water are carried by said tile drains west of the petitioner's lands, but deny that said volumes of water are deposited through said inlets upon the lands of the petitioner; and deny that the tile drains of said district, leading from the petitioner's lands to the outlet of said district, are insufficient and inadequate in capacity to carry off the water falling and

accumulating on the land of the district, similarly situated, and deny that the tile drain from the lands of the petitioner to the outlet is inadequate to carry off the

water flowing and accumulating upon the lands of the petitioner, and that said tiles are overtaxed and by means thereof large quantities of water acumulated and remain standing on the lands of the petitioner and others rendering them unfit for planting and cultivating the crops, and that the petitioner and others have been damaged.

The respondents denied that the petitioner's drainage, prior to the installation of this system, carried off the waters from his land more adequately than under the present system, and respondents averred that it was impossible to construct a system of drainage that would carry the waters off from the lands of the petitioner in the time desired by the petitioner, and that the cost of the system proposed by the petitioner would exceed the benefits accruing to the district.

The cause was submitted to a jury and there were four special interrogatories submitted to them, which were returned into court with the answers of the jury as follows:

First: Has the Drainage District failed to furnish sufficient outlet for the adequate drainage of the lands of petitioner?

Answer, Yes.

Second: Can the defendant *** (Drainage district) furnish to the lands of petitioner in said district a sufficient outlet?

Answer, Yes.

Third: Are the lands of the petitioner in the district receiving the benefits contemplated at the time of the assessment of said lands?

Answer, No.

Fourth: If you find the lands of the petitioner in the district have not an adequate outlet for their drainage will the cost of such adequate outlet exceed the total benefits to the lands of the district?

Answeer, No.

There was no general verdict. The Court entered judgment granting the prayer of the petition, and the order included the payment of costs by appellants, for which an execution was ordered.

The record is brought to this court, by appeal, for review.

Appellants have submitted numerous assignments of error which we shall consider, so far as they have been argued, and we deem necessary to a decision of the case.

Under the proofs made. petitioner's land adjoins the south boundary line of the district and the boundaries of

the district extend southwesternly, west and northwesterly for a distance of about two miles in each direction. From petitioner's land the district extends northeasterly two and one-half to three miles to the outlet of the drainage. At a point three-fourths of a mile north and at a small angle west from the northwest corner of petitioner's land, the north line of the district. after bearing east about one and three-fourths miles, turns north and bears north about two miles to the extreme north line of the district, from which place the line runs east to a point not far north from the outlet. The southerly line of the district, starting about one mile south and three-fourths of a mile east from the outlet, follows a southwest course along the south line of the petitioner's lands in the same course to the west line of petitioner's

land; thence west one-half mile; thence south one-half mile; thence west one mile to the southwest corner of the district. The west line of the district extends northwestardly about one and one-half miles, bearing to the one-half mile, These distances are not stated exactly but show substantially the size and contour of the district.

Petitioner owns forty acres of land in a three cornered tract south of and adjoining the south boundary line of the district, which lands do not drain into this district except that some surface waters may flow over into the district and follow the old water course that ran northeasterly through the district, Petitioner owns the northwest quarter of Section 13, forty acres of which lies south of the boundary line of the district as indicated. There is a public highway along the north and west lines of petitioner's land, on the section lines. The main drain tile is 22,041 feet in length and composed of 30inch, 27 inch, 24 inch, 23 inch and down to 15 inch tile. This main drain tile ends at a point about one and one-fourth mile west and one-eighth mile north of the north line of petitioners land, and in its course southwesterly from the outlet, it turns in the southeast corner of the southwest quarter of section twelve, immediately north of petitioner's land, and runs directly west (a few rods north of petitioner's land) nearly across the quarter section, again turning to the northwest, which course it pursues for fully one-fourth mile, when it again runs west and southwesterly to its westerly point in the southeast quarter of section ten, as set out, but directly above petitioner's land, forming the apparent neck of a bottle in its course.

Lateral "C" or branch "C" for minute drainage of said district, commencing in the south half of section twelve and extending for a distance of 4143 feet southwesterly and across the lands of the petitioner, is constructed of 15, 14, 12, 10, 8 and 6 inch tile.

It was shown that from the west of the main drain tile to the petitioner's land, and the outlet of lateral "C" there was a 30 foot fall, and from the source of lateral 'C' about five thousand feet southwest from petitioner's land to its junction with the main drain tile, there was a fall of about thirty-three feet, and all of the lands to the southwest, west and northwest of petitioner's land formed a shed which gradually sloped to the main drain tile near the northwest corner of the petitioner's lands. The main drain tile is about eight rods north of petitioner's north line and extends straight east for a distance of eighty rods. Laterals "D" and "E" empty into the main tile west of petitioner's lands.

The 15 inch tile of lateral "C" runs diagonally across petitioner's land from southwest to northeast for about ninety rods, and there are several strings of tile on petitioner's land for minute drainage of the same, installed after the construction of the main drainage tile and lateral "C". There are some 8 inch tile; 10 inch tile; and some 12inch tile. There are also other strings of tile, being 7 inch, 6 inch and 5 inch tile, on petitioner's ground, going in all different directions and connecting with the tiles of the district.

The lands of the petitioner are low and flat. Near the land of the petitioner there are three manholes or inlets, leading

from the surface of the ground to the tile of the district. Two of these inlets proceed from the surface of the ground to the tile of Lateral "C", one in the highway running north and south, immediately west of the petitioner's land, and one at the north edge of the petitioner's land, in the highway running east and west on the north side thereof. The other inlet is on the main tile line in the road running north and south on the west side of the petitioner's land, and about a quarter of a mile north.

A portion of petitioner's lands in the northwest part of the quarter section were shown to be low and flat. Testimony was submitted tending to show that the drainage system established was designed to remove one-fourth to three-eighths of an inch of rainfall every twenty-four hours, and there was further testimony tending to show that water in much greater quantities

fell in the usual course of the seasons. In fact, testimony was submitted tending to show that in 1919 there were twenty-one rains of more than one-half inch fall of water and thirteen of more than one inch fall, and testimony as to the rainfall of the various seasons back to 1910 was produced, tending to show that rain falls of one-half to one inch in dept were of frequent and usual occurrence.

There was testimony tending to show that surface waters ran off into the inlets described, and that frequently waters were standing upon petitioner's lands in the northwest portion of the quarter section, and that at times as high as sixty acres of land was flooded, and crops destroyed.

There was testimony tending to show that on frequent occasions the water would spurt or boil up out of the inlets and spread over

the lands of the petitioner, and there is competent testimony in the record from which a jury was warranted in finding that the outlet and main drain tiles of the district were not of sufficient capacity to carry the waters of the district.

It was shown that the lands of others in the district had been overflowed from the same causes, although they did not join with the petitioner in this cause.

There was testimony tending to show that the waters of the district could be carried off and the situation relieved by constructing an open ditch from petitioner's lands along the line of the former ditch to the outlet, and that the lands of the district would be benefited in a sum far in excess of the cost of such improvement.

To meet this case appellants offered to submit proofs showing that the lands of the petitioner had been benefited by the present improvement in excess of the assessments paid upon the lands, and it was shown that before this drainage was constructed, there was a clump of willows, covering two or three acres of land in the northwest part of petitioner's land, which had been removed and the land now in the cultivated field. The testimony of witnesses was produced by appellants, which tended to show a less injury to petitioner's land and crops than was shown by petitioner's testimony, It was not denied but that at times there was standing water in petitioner's field, and that there were overflows, but testimony was submitted by appellants tending to minimize the injuries caused by these overflows; to account for them in part or in whole, by waters flowing through the sluiceways or culverts, upon the public high-

way, which was not under the jurisdiction of appellants and appellants, by testimony, sought to show that at the time when water spurted

or boiled out of the inlets and flooded over the petitioner's lands, the whole vicinity was inundated by excessive rainfalls, and that petitioner suffered no greater injury than others both in and without the drainage district. All of these matters and the testimony was before the jury, and from it the jury made up its findings as to the special interrogatories.

The record is voluminous and to it,with the maps. plats, exhibits, briefs and argument, we have given due consideration, after a careful examination of the entire record.

The petition is based upon sections 17 and 41 of the Act to provide Drainage for Agricultural Purposes. Section 17 provides:

"Upon the organization of a drainage district, the commissioners shall go upon the land and determine upon a system of drainage, which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies, as well as the present. Preference shall be given to tile drains, wherever these will accomplish the purpose, and when open drains are deemed necessary, if it be practicable, these shall follow boundary lines and parallels or right angles, as the case may be, provided the drainage shall not be impaired thereby," etc.

Section 41 provides:

"After the completion of the work the comissioners shall thereafter keep the same in repair and if they find by reason of error, in locating or constructing the ditches or any of them, or from any other causes the lands of the district are not drained or protected, as contemplated, or some of them receive partial or no benefit, they shall use the corporate funds of the district to carry out the origional purpose to the end that all the lands, so

far as practicable, shall receive their proper and equal benefits, as contemplated when the lands were classified," etc.

Additional tax levies may be made where necessary, but in every such case the benefits accruing to the district must exceed the cost of the improvement.

The real question in the case is, whether by reason of error in locating or constructing the ditches or drains or any of them, or for any other cause, the lands of the district are not drained or protected as contemplated,

and whether they can be drained and at an expense within the limits of the benefits accruing to the district from such completed drainage.

Appellants have made thirty-nine assignments of error on the rulings of the court in the admission and rejection of testimony. We have examined the record as to each assignment. There were some leading questions asked. There were some questions asked and answered and in the presence of the jury afterwards stricken out. One witness had testified to seeing the water flooded over three feet above the man-holes or inlets, and at the same time seeing water spurting up from the man-holes a foot above the level of the water. Witness was asked, over the objection of appellants, if the reason for this was because the outlet in the Warner land on down to the ditch was not enough to carry the water. This was leading and invaded the province of the jury and was an inquiry as to one of the ultimate facts in the case. There was one or two other questions of a similar nature asked and answered, over appellants' objection, and as to other questions of a similar nature the objection was sustained.

There was no testimony on either side as to any obstructions in the drains, and it may be presumed that appellants, the respondents, had performed their official duty and kept the drains and tile clear. If such is the case, appellants could not have been injured by the error.

The fall from the petitioner's land northeasterly to the outlet is only about seven feet. If there were no obstructions in the drain nothing in the view of this court could have caused the water at the inlet to boil or spurt up four feet in height and through three feet of standing water, except that the ditch or drain was not large enough to carry the water of the district, but the jury should have been permitted to arrive at their conclusion from the testimony given. We are not able to conclude, however, that any reversible error was committed, growing out of these numerous assignments.

There are eleven assignments of error based upon remarks made by the court and counsel during the trial of the case, in the presence of the jury, to which exception was duly taken by appellants. We have examined each charge, and while as to some of them on the part of court and counsel an attempt was made to restate the evidence, and there was more or less argument, nothing occured that in the view of this court would constitute reversible error. Some of the assignments of error are without

merit.

The court gave seventeen instructions in behalf of the petitioner, to all of which appellants entered objection and upon which error is assigned, some of which appellants argue.

Instructions one and three are not in conflict and state the law as held in **Stoddard v. Keefe,** 278 Ill. 512; **Thompson v. Hughes,** 286 Ill. 128; **Kendall v. Montgomery,** 122 Ill. App. 552.

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Appellants' instructions nineteen and twenty covering the same subject, state the law too favorably to appellants.

The construction of Section 41 of the Farm Drainage Act has been before the Supreme Court and the Appellate Courts in various cases, and it has been held that the duty imposed by this section upon the commissioners is a duty which they owe to every landowner who has been assessed for the construction of the system, provided the cost does not exceed the benefit. "It has been held that this duty is mandatory and the landowners have the right to require the commissioners to adopt, **construct** and maintain a system of drainage which will provide a main outlet of ample capacity to carry off the waters of the district, and if the commissioners neglect or refuse to perform their duties they may be compelled by mandamus to do what the law provides they shall do. **Peotone & M. Drain Dist v. Adams,** 163 Ill. 428; **Langan v. Milk's Grove Spec. Drain. Dist.,** 239 Ill. 430; **People v. Garner,** 275 Ill. 228; **Adolph v. Drainage Dist. No. 2 Com'rs,** 276 Ill. 483; **Stoddard v. Keefe,** 278 Ill. 512." **(Kendall v. Montgomery,** 222 Ill. App. 558).

The benefits taken into consideration when the lands are first classified do not exhaust the landowners' right to have the lands provided with practicable outlet drainage.

In **Staddord v. Keefe, Supra,** the Court said: "It is a continuing duty, and it is not discharged until a ditch has been constucted of sufficient capacity to afford ample drainage for all of the lands in the district, that have been assessed for the improvement, if this can be done at cost not exceeding the total benefits to the lands in the district."

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Petitioner's instructions number two informs the jury that the purpose of the Farm Drainage Act to furnish adequate drainage to all lands within the district, provided the costs are within the benefits. This is the law. This is the language of the court in **Kendall v.**

Montgomery, supra, and in **Stoddard v. Keefe, supra.**

We have examined the other instructions so far as they relate to the law of drainage and find them in accord with the rules of law laid down in the cases cited and free from error.

In the eleventh instruction as to the preponderance of evidence, the jury are informed in the usual form of instruction upon that subject, that they **should** take into consideration the number of witnesses testifying on either side of a given fact, etc.

It has been held error to instruct the jury as to the credibility of witnesses in mandatory form. **I. C. R. R. Co. v. Burke,** 122 Ill. App. 415, but such an instruction has rarely been held reversible error, and it has been held that the number of witnesses testifying to a particular fact or state of facts is an important element to be considered in determining where the preponderance of evidence lies. **Hutchinson v. Chicago City Ry. Co.,** 192 Ill. App. 465.

The number of witnesses testifying on each side in the trial of an action is a proper but not an absolute controlling element to be considered by the jury in weighing the evidence. **Roesner v. Dellenbarger,** 192 Ill. App. 25; **Kiess v. Block & Kuhl Co.,** 205 Ill. App. 168; **Butler v. Whiteman,** 196 Ill. App. 322; **Manzello v. Chicago City Ry. Co.,** 207 Ill. App. 16.

We do not regard the giving of this instruction as reversible error and find no error in any of the instructions that would warrant a reversal of the judgment in this case.

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It is contended by appellants that there is no competent proof in the record showing that the benefits to the district would exceed the cost of the improvement. There was some proof covering this issue submitted by petitioner, but the burden of proof on this issue is upon the appellants to show that the lands of the district would not be benefited. **Stoddard v. Keefe, Supra.**

The record is not free from error, but we find no substantial errors that in the view of this court were sufficient to have prejudiced the jury in making up their findings, or that contravened the law. If the facts exist as to this drainage district, as detailed by many of the witnesses, in many substantial matters uncontradicted, it is difficult for a court to arrive at any other conclusion from reading te evidence, than that the main tile or drain is insufficient to carry away the waters of the district, and if this is so, while the injury may be greater upon some lands than others, it does injure the entire

drainage of the district. The fact that the lands of petitioner have been benefitted, the amount of the assessments paid, or that the improvements is all that was had in contemplation when the district was organized, is not a defense to this petition. In **Stoddard v. Keefe, Supra,** the court said on page 518:

"Also, if the system of drainage adopted is not of sufficient capacity to afford proper drainage for all the lands of the district, that the commissioners may be compelled, by **mandamus,** to deepen and widen the outlet or otherwise improve the same so as to afford adequate drainage for the lands of the district if it can be done at a cost not exceeding the benefits accruing to the lands in the district. **(Peotone Drainage District v. Adams,** 163 Ill. 428; **Langan v. Milk's Grove Special Drainage District,** 239 id. 430; **People**

v. Garner, 275 id. 228; **Adolph v. Commissioners of Drainage District,** 276 id. 483.)

That part of the judgment of the court below, awarding an execution against the appellants for costs, was error, but the error does not go to the merits of the case and the judgment should not be reversed, but may be modified in this court. **School Directors v. Orr,** 88 Ill. App. 648; **City of Pekin v. McMahon,** 53 Ill. App. 189; **City of Pekin v. McMahon,** 154 Ill. 141.

The judgment of the lower court is modified by eliminating that part of the judgment providing for an execution to issue.

As to all other matters, the judgment of the lower court is affirmed.

Judgment Affirmed.

General No. 7701 Agenda No. 4

April Term A. D. 1924

People of the State of Illinois, Defendant in Error.

vs.

Hattie Van Dorn, Plaintiff in Error.

Writ of Error to the County Court of Vermilion County.

SHURTLEFF, P. J.

Plaintiff in error was indicted by the Grand Jury of Vermilion County under Section 57 of the Criminal Code, charging in four counts that plaintiff in error was guilty, first, of keeping a house of ill-fame; second, a common ill goverened and disorderly house to the encouragement of idleness, gaming, drinking, fornication and other misbehaviors; third, letting a certain room for the purpose of the practice of prostitution and lewdness; and fourth, letting certain rooms for said last mentioned purposes, respectively.

The indictment having been certified to the County Court of Vermilion County for trial, there was a trial by jury and plaintiff in error found guilty on each count of the indictment. Judgment was entered on the verdict and a fine imposed on each count.

Cortez Rufus was the only witness for the State. In his testimony in chief he said that about May 18, 1823, in the day time, he went to plaintiff in error's residence on the north side of a certain street, talked with her, was invited by a certain girl he saw there to go upstairs to a room, but did not testify to any adultry; that he had been at the residence once before and once after, before

in January when he went to a room with a different girl and went to bed with her, and that he was there a later time but did not fix the date. On cross examination he claimed he had been at plaintiff in error's residence and as late as the fall when the case was tried. He described the location of her house.

On cross examination the witness was asked:

Q. I'll ask you if yesterday you didn't tell Mr. Armstrong, who is with Squire Parker in this city, that you were at Mrs. Van Dorn's either the first Saturday or the second Saturday of last May?

Q. And that was the only time in May last that you were at her house?

To both of which questions objections were interposed by defendant in error and sustained.

Again the witness was asked on cross examination:

Q. Day before yesterday, in my office, didn't you say to Mr. Armstrong mentioned, that you were down at Hattie Van Dorn's in May, 1923, on a Saturday night, either the first Saturday, or second Saturday of May and that's the only time you were there, didn't you say that?

Q. This morning in the court room I asked you to show me which one Hattie Van Dorn was?

Q. And then didn't you come in the court room and point to this lady with the purple hat, who is seated about the middle of these seats and told me that was Hattie Van Dorn?

To all of these questions defendant in error objected and was sustained, the Court stating: Yes, I don't see what that has to do with this case."

Again, the witness was asked:

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Q. Did you not further say at my office at that time after you said her house was on the south side of South St. and the first house west of the Danville Transfer Company's barn as you went from College St., that it was a two story frame building and that a woman called "Mother Shank" lived next door, west of Hattie Van Dorn?

This question was objected to and sustained, the Court stating: "It don't make any difference about that."

Again, the witness was inquired of on cross examination if he did not before Mr. Armstrong, in the office of the attorney for plaintiff in error, describe plaintiff in error, whom he called Hattie Van Dorn, as a woman who weighed about one hundred forty pounds and would be about forty or forty-five or forty-eight years of age?

This question upon objection was sustained by the Court.

Plaintiff in error, upon her defense, submitted proofs which were uncontradicted, tending to show that on the 23rd day of April, 1923, she left Danville and went to Oklahoma to visit a brother, where she remained not returning to Danville until the 25th day of May following. Neighbors living in the vicinity of plaintiff in error's home, testified to the character of the plaintiff in error within their knowledge, and the orderly and law abiding conduct of the premises, which she occupied. It was essential, therefore, that the Court's rulings on the admission of evidence should be free from error and not prejudicial to the case of plaintiff in error. The statements of the witness, if he made such, were material, and tended to contradict Rufus' testimony in court, and plaintiff in error was before the jury where her age and weight could be considered in connection with the testi-

mony given.

Plaintiff in error offered to prove that the statements were made by the witness Rufus, as contained in the interrogatories, and that when the witness Rufus in court was asked to identify plaintiff in error he identified or pointed out a different woman; but the court sustained objections to each and all of these offers on the part of plaintiff in error. This was error. **Math v. Chicago,** 243 Ill. 114; **Reich v. The People,** 229 Ill. 574.

The Court gave People's instruction number three, which informed the jury that they had the right to take into consideration 'the reputation of the frequenters and inmates of the house in question, for chastity or unchastity, whether law abiding or disorderly, and the fact, if proven, that the defendant kept in her house women of ill repute is a strong circumstance tending to show the guilt of the accused."

There was no evidence of any kind submitted by defendant in error as to the reputation of any person connected with the premises, but the case, resting entirely upon the testimony of the one witness, as to direct acts, the giving of this instruction was error.

Plaintiff in error assigns error on her instruction number thirteen, as to the rules of determining the credibility of witnesses, which was refused. No other instruction was given the jury on this subject, and the instruction should have been given.

Other complaints are made as to errors in this record, but we deem the above sufficient to make it necessary to set aside the verdict and judgment of the lower court.

The judgment of the County Court of Vermilion County is reversed and the cause remanded to that Court for another trial.

Reversed and Remanded.

235 I.A. 636

General No. 7707 Agenda No. 7

April Term, A. D. 1924

People of the State of Illinois, Defendant in Error,

vs.

Ralph E. Gray, Plaintiff in Error.

Writ of Error to the Circuit Court of Vermilion County.

SHURTLEFF, P. J.

This case comes to this Court on a writ of error to the Circuit Court of Vermilion County. It grows out of a prosecution for criminal comtempt for failure to obey a subpoena. The information filed by the state's attorney set forth that a certain criminal case entitled People v. Urban DeChant, being an indictment for grand larceny was set for trial in the Circuit Court of Vermilion County on June 18, 1923, and that a subpoena was issued and delivered to the Sheriff of Vermilion County for plaintiff in error as a witness in said case, and that plaintiff in error was subpoenaed by the Sheriff to appear in said court at said time but failed to do so, and when said case came on for trial a plea of guilty to petty larceny by the defendant therein was accepted because of the absence of plaintiff in error.

It was further set forth in the information that in the trial of a certain other criminal case wherein Urban DeChant and plaintiff in error were jointly indicted for confidence game and in which plaintiff in error alone was being tried, the said Urban DeChant testified that he had paid plaintiff in error one hundred twenty-five dollars shortly prior to the time when

plaintiff in error was subpoenaed to appear as a witness in the case of People v. DeChant for the purpose of inducing plaintiff in error not to appear as a witness in said case, and that said DeChant further testified that said one hundred twenty-five dollars was part of the proceeds arising out of the charge of confidence game upon which plaintiff in error was then being tried.

The matter was set down for hearing and upon the hearing plaintiff in error answered the information by taking the witness stand and testifying under oath showing: that he had lived in Decatur, Illinois, all his life; that he was nineteen years old and previous to the time when subpoenaed in the DeChant case he had never been subpoenaed as a witness in a case before and had likewise never been a witness in a case before; that he was sub-

poenaed on the morning of June 18, 1923, while at his room at the Y. M. C. A., where he was then staying, to appear in the Circuit Court of Vermilion County at nine o'clock a. m. of that day in the DeChant case; that pursuant to said subpoena he came up to the court room in the court house at Danville and heard a lady read over a list of names and his name not being in the list he got the impression that the trial wouldn't come up until later; that he also saw other men come up for trial and saw them picking a jury and start the trial of another case, so he went out of the court house and came back later or about eleven o'clock; that while he was inside the court house, but before he had reached the court room when coming back the second time, he met C. M. Crayton, who was DeChant's lawyer; that he had met Crayton once before at Crayton's office and knew who he was; that plaintiff in error asked Crayton how he thought

DeChant's case would come out and Crayton said to plaintff in error: "The best thing for you to do is to go to Detroit;" that Crayton repeated this several times and plaintiff in error left the court house, went to his room at the Y. M. C. A., packed his grip and left on the noon train for Detroit, where he stayed for a day or two and then went over to Windsor, Canada, and while there wrote Crayton a letter inquiring how the DeChant case came out.

Plaintiff in error further testified under oath that he didn't know he was committing a wrong when he left pursuant to Crayton's instructions, and had no intention to willfully defy the process of the court at the time he so went away.

He further testified that previous to June 18, 1923, DeChant had stolen his trunk, two suits of clothes, bath robe, shirts, socks, rifle and set of boxing gloves, which were of the value of two hundred dollars, and on the day before DeChant's trial DeChant had given him one hundred dollars to apply on the value of the goods which he had stolen from plaintiff in error; that he had not been subpoenaed at that time and nothing was said at that time between him and DeChant about such payment being for the purpose of keeping plaintiff in error from appearing as a witness against DeChant, and that he (plaintiff in error) did not go away pursuant to any arrangement between DeChant and plaintiff in error whereby plaintiff in error would not appear as a witness against DeChant.

He further testified that he didn's think he was the

prosecuting witness in the case against DeChant and that he wasn't called before the grand jury in that case.

There was a judgment of conviction and plaintiff in error was sentenced to confinement in the county jail for a period of 120 days and to pay a fine of one hundred dollars.

It is contended by plaintiff in error that the charge here is for a criminal contempt, and that it is improper for a court to receive or consider any evidence or facts in determining the guilt of the accused outside of the sworn answer and what occurred in court at the time of the alleged contempt. **People v. Hile,** 192 Ill. App. 148; **DeBenkelaer v. People,** 25 Ill. App. 464; **People v. Cochran,** 149 Ill. 370, and **Early v. People,** 117 App. 617. And it is further contended by plaintiff in error that to constitute the contempt there must be a union or joint operation of act and criminal intention. Consequently, a person may purge himself of contempt by showing that he acted innocently or through ignorance and without any intention to wrongfully mislead or deceive the court, citing **People v. Hile, supra; Powers v. The People,** 114 Ill. App. 327, and **Parsons v. People,** 51 Ill. App. 467.

Plaintiff in error in substance correctly states the principles of law applicable to this case, but it was held in the case of **The People v. Hile, supra,** on a charge of direct contempt, that it "was improper and erroneous for the court to receive or consider any evidence or facts in determining the guilt of the accused outside of his sworn answer and what occurred in court when the cases were stricken off," citing **Early v. People,** 117 Ill. App. 617; **People v. Cochran,** 149 Ill. App. 369; **Oster v. The People,** 192 Ill.App.473, and in **People v. Ferriman,** 128Ill. App. 234, it was held that the court may

consider "the facts that tanspired in the presence of the Court."

It was further held in **People v. Ferriman, supra,** on page 235: "Where a witness has been duly subpoenaed he is bound to make extraordinary effort to attend. No inconvenience to the witness incident to his attendance will justify his absence. His justification or excuse, in the facts, must be serious and substantial, and such as the court may hold to be reasonable under all the surroundings facts and conditions. Whether the state of facts disclosed in the answer will be accepted as sufficient justification or excuse for the witness' is failure to obey the subpoena, rests largely in the judicial discre-

tion of the court, and this discretion will not be reviewed, "unless it clearly appears to have been abused," and if the answer states facts inconsistent with respondent's avowed purpose and intention, the court will be at liberty to draw its own inferences from the facts stated. **People v. Grogan,** 178 Ill. App. 317.

Plaintiff was before the court in answer to the subpoena, and went away, but it is not made plain that plaintiff in error was before the court during any of the proceedings in the DeChant case, in which plaintiff in error was summoned to testify. However, the Court, in passing upon the sworn testimony of plaintiff in error, taken in lieu of a sworn answer, expressly eliminated every matter except as to the matters shown in plaintiff in error's testimony. The court did, in the finding, make expressions about the DeChant trial and the result caused by the absence of plaintiff in error and the loss of his testimony, but

all of this was by way of argument and statement, and the Court expressly eliminated this and all similar matters not based strictly upon plaintiff in error's testimony, in making up the finding and judgment of the Court.

The Court further eliminated from consideration in the case the fact that DeChant had paid plaintiff in error one hundred dollars the day before the DeChant trial, and conceded that it may have been paid to plaintiff in error on an account and not to induce plaintiff in error to disregard the subpoena.

The finding and judgment of the Court was based absolutely upon the sworn testimony of plaintiff in error in this proceeding, and it was so stated by the Court, recognizing the authorities cited, and any expressions of opinion or argument indulged in by the Court, were more than warranted by the testimony of plaintiff in error. Plaintiff in error testified that he did not know he was committing a wrong when he left Danville and went to Dertoit, pursuant to Crayton's instructions. Plaintiff in error was nineteen years of age. He could read and write. He knew, as he was told by Crayton, attorney for DeChant, that if he went away DeChant would come out all right, and while plaintiff in error was at Windsor, Canada, he wrote Crayton to find out how DeChant's case came out. Plaintiff in error can not be permitted, in a proceeding of this nature, to contradict the motive

which is to be inferred from every act he performed. **People v. Ferriman, supra; People v. Grogan, supra;** and **People v. Gilbert,** 204 Ill. App. 97.

There is no error in the entering of the judgment in this case and the penalty imposed is not excessive.

Judgment affirmed.

235 I.A. 636

General No. 7711 Agenda No. 10

April Term, A. D. 1924

The First National Bank of Monticello, (a corporation)
Appellant
vs.
John W. Dubson, Appellee

Appeal from Circuit Court of Piatt County.

SHURTLEFF, P. J.

One question in this case arises upon the validity of a judgment, entered in vacation, in the Circuit Court of Piatt County, after the June Term, A. D. 1923, in favor of appellant and against the appellee. On the 26th day of September, A. D. 1923, appellant filed its narr in proper form and cognovit with the Clerk of said Court, on a judgment note, bearing date October 16, 1922, by which instrument appellee promised to pay the appellant the sum of $701.97 six months after date, with interest at the rate of seven per cent per annum from its date until paid. The judgment was confessed for the principal and interest due on said note at the date of judgment, amounting to the sum of $700.95, and for the additional amount of seventy dollars as attorney's fees for entering the judgment. In the narr and in the copy of the note attached, the power of attorney, signed by appellee, as described, authorizes irrevocably, any attorney of any court of record to appear for appellee in such court in term time or vacation, at any time hereafter, and confess a judgment for such amount as may appear to be unpaid thereon, together with costs and ———— dollars attorney's fee. The

amount of the attorney's fees is not stated. Attached to the narr and cognovit is a "copy of note attached to narr and cognovit $701.97," and also attached to narr and cognovit is the affidavit of William Dighton, in proper form, setting out the amount of the debt, the usual statement as to the genuineness of the signature of the maker and stating that the defendant J. W. Dubson is living and that no part of the said debt is for usurious interest, and this affidavit is properly verified. The original note is in the record brought to this court, which was filed in the court below January 3, 1924, **nunc pro tunc,** as of September 26, 1923. It is apparent that the original note and power of attorney were not filed with the clerk, or attached to the narr and cognovit, on September 26, 1923, at the time of entering judgment, but that said original instrument only became

a part of the record at a later term and by order of court appellant was given leave to file said power or warrant of attorney on January 3, 1924, **nunc pro tunc.**

At the time said original warrant of attorney was filed on January 3, 1924, appellee moved the court to vacate said judgment, and the court granted the motion and entered an order vacating said judgment and setting the same aside and the execution issued on said judgment was stayed pending an appeal. Appellant has appealed from this order.

The principal question attempted to be raised in the case is, whether the clerk, in vacation, had any power or authority under the statute, to enter the judgment without the original warrant of attorney being attached to said proceedings or filed in his office.

It is not a question of pleading, as argued by appellant,

for there is authority and the statute provides, that plaintiff need not make profert of the note until called upon by the opposite party to do so, but the instrument in this case has a double aspect. It is both a promissory note and a power of attorney, and while the narr, under our statute, could state a good cause of action, without pleading the note verbatim, it has been held from a very early date that the authority of clerks to enter judgments in vacation was purely statutory, and that in so doing they act ministerially and that in entering such judgments the original power of attorney, to confess judgment executed by defendants, must be filed with the clerk as a part of the papers in the case. **Durham v. Brown,** 24 Ill. 94; **Round v. Hunt,** 24 Ill. 598; **The People v. Whitehead,** 90 Ill. App. 614; **Gardner v. Bunn,** 132 Ill. 403. However, after the entry of said judgment in vacation, on the opening of the next term of said court on October 1, 1923, various motions were made in said cause, some of which have not been disposed of.

Upon October 1, 1923, appellee, (defendant) moved the court, upon a petition filed, to vacate said judgment, and for leave to plead in said cause. The court entered an order, giving appellee leave to plead to the declaration and entered an order staying execution in the cause. This was a general appearance of appellee in the suit. Pending the preceding motion, the appellant, upon October 22, 1923, moved the court for leave to file a cross motion to be permitted to withdraw the copy of the note sued upon and attached to the original narr and cognovit filed in said cause and to attach the original note to

said declaration and confession, and to amend the **ad damnum** in the declaration or

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narr by alleging damages in the sum of one thousand dollars in place of $700.95. And again on October 24, 1923, appellant moved the court for leave to file said original note **nunc pro tunc** as of September 26, 1923.

On January 3, 1924, appellee moved the court to vacate the judgment which was allowed, and further moved the court to withdraw the leave to plead and order staying execution and before this motion was passed upon the court gave appellant leave to file said original note and power of attorney **nunc pro tunc,** as a part of the files of said original proceeding as of September 26, 1923, and said note was so filed.

Appellee further moved to quash the execution, which was overruled by the court, whereupon the court, upon due deliberation, granted a stay of execution pending appeal. Thereupon appellant moved the court to vacate the order vacating the judgment and **quashing** the execution, which was overruled by the court, and appellee entered a motion that all costs in this suit be taxed against plaintiff, which the court overruled.

It was therefore "considered by the court that the judgment heretofore rendered on September 26, A. D. 1923, in favor of the plaintiff and against the defendant by confession be, and the same is hereby set aside and vacated and the execution thereof stayed pending appeal and exceptions."

Appellee entered no exceptions to any of these orders and has made no assignment of cross errors.

In appellee's petition of October 1, 1923, to set aside the judgment, appellee raised the legal objections and jurisdictional questions herein set out, and in addition filed an affidavit

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appealing to the equity side of the court and averring payments upon the note, and that Ross W. Churchill, the payee in said note, was indebted to the appellee in the sum of $208.16. Upon this petition appellee was given leave to plead, the judgment was vacated, but the court refused to quash the execution and refused to enter any order as to costs in the case. In this state of the record, the case is not disposed of in the lower court, and there is no final judgment from which appellant can take an appeal. Appellee's rights have been to some extent modified by the orders entered in the lower court without objection. The record of

the confession of judgment now shows, by order of court, the original power of attorney executed by appellee. The appellee, upon his motion, has obtained leave to plead to the declaration and the execution is not cancelled but merely stayed, pending this appeal. If there were a final judgment before the court, in the present state of the record it would be a serious question as to whether appellee had not waived the jurisdictional questions and appealed to the equitable side of the court on the merits of the case, and whether the record of the judgment at this time did not show merely legal and technical errors which had been released by the cognovit, and in such case appellee would be bound by the cases: **Lake v. Cook,** 15 Ill. 353; **Rising v. Barnard,** 36 Ill. 79; **Hansen v. Schlesinger,** 125 Ill. 230; **Holmes v. Parker,** 125 Ill. 478; **Pearce v. Miller,** 201 Ill. 190;**Packer v. Roberts,** 140 Ill. 17; **Moyses v. Schendorf,** 238 Ill. 233; **Martin v. Knight,** 56 Ill. App. 65; **Nees v. Dumbauld,** 142 Ill. App. 488;**Knox v. Winsted Savings Bank,** 57 Ill. 330, and other kindred cases. If, however, the record is taken as a proceeding to set aside a void judgment after the term, it must be

for some other reason than mere legal errors and technical difficulties, and the judgment must be absolutely without authority and void, between which two lines of cases the distinction is at times with great difficulty pointed out. **Stein v. Good,** 115 Ill. 95; **Graves v. Whitney,** 49 Ill. App. 435; **Baldwin v. McClelland,** 152 Ill. 49; **Whitney v. Bohlen,** 157 Ill. 575; **First Nat. Bank v. Havens and Geddes Co.** 61 Ill. App. 213, and other cases. In **Stein v. Good, supra,** the court say:

"It may be admitted that if all the expressions to be found in the cases bearing on the question, were collected together and construed without regard to the particular facts in the cases to which they severally relate, both positions might possibly find apparent support. Indeed, it would be no cause for surprise if they did."

In many of the later cases, however, the court did set aside judgment after the term, entered without any jurisdiction and upon confession. We are familiar with the authority that a judgment in vacation cannot be entered or aided by an order **nunc pro tunc,** and we deem it an anomaly to move to set aside a judgment on jurisdictional grounds and at the same time appeal to the equitable side of the court and obtain leave to plead.

The only real effect of the order, "The judgment to stand as security, is to stay execution until there was a

trial on the pleas that might be filed." **Northeastern Coal Co. v. Tynell,** 133 Ill. App. 475. However, appellee has assigned no cross errors to the rulings of the lower court and cannot be heard to complain as to the effect of such orders.

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This case differs from **Roundy v. Hunt, supra,** in the final diposition of the case on the record, in that in **Roundy v. Hunt** the debtor appealed. In this case the judgment creditor appeals.

The court below did not cancel and set aside the judgment. Appellee was given leave to plead. The court refused to quash but stayed the execution, pending this appeal. The court refused to make any order as to costs. The proceeding is still pending and undetermined in the lower court and this appeal is premature. **Walker v. Oliver,** 63 Ill. 199; **Cromer v. Commercial Men's Ass'n.** 260 Ill. 519; **The People v. Wells,** 255 Ill. 455; **City of Park Ridge v. Murphy,** 258 Ill. 367; **Dean v. Gerloch,** 34 Ill. App. 234; **Andrews & Co. v. Anchor Folding Box Man'f'r. Co. et al.** 210 Ill. App. 636.

It appearing that some, if not all, of the issues involved in this proceeding are still pending in the lower court, this court of its own motion dismisses the appeal.

Appeal Dismissed.

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235 I.A. 636

General No. 7727 Agenda No. 22

April Term, A. D. 1924

Arthur Leetham, Appellee

vs.

American Zinc Company of Illinois, Appellant

Appeal from the Montgomery County Circuit Court.

SHURTLEFF, P. J.

Appellee recovered a judgment in the court below for the sum of two thousand dollars for permanent damages to his dwelling house, lot and premises, caused by the smoke, gases and fumes coming from the smelter plant of appellant in which spelter and sulphuric acid are manufactured. Spelter is the finished product of a process of smelting the raw zinc ore in especially designed furnaces, the ore being first roasted to take from it the sulphur from which sulphuric acid is manufactured.

In the process of the manufacture of spelter, it first goes off in vapor into condensers, the roasted ore, coke and anthracite coal being used. This is done after the ore has been roasted in the kilns. The roasting process extracts the sulphur, which is conveyed through large conveying pipes to the acid plant, and there manufactured into sulphuric acid, the major portion of which goes to the fertilizing industries for making farm fertilizer. At the oxide plant zinc oxide is made, which is a paint figment and is used with white lead, fifty per cent of each, to make commercial

paints for painting houses, barns and other buildings. The zinc ore in its natural state, as it comes from the mines, is a whitish looking substance, finely ground, has 58 to 60 per cent zinc contents, and carries about thirty per cent sulphur and a small amount of lime, lead and iron. This ore is ground up until it will pass through a mesh screen, and for the manufacture of spelter is treated in the Hegler kilns in retorts. The purpose of roasting it is to burn the sulphur out of the zinc ore and to reduce the sulphur in the ore. The sulphur goes through large conveying flues or pipes to the acid plant to make sulphuric acid, and is not turned into the air, but is turned into and kept in the acid chambers. Spelter in its commercial form is a plate or bar weighing about forty-five to fifty pounds, known as zinc, used for galvanizing barbed wire, pails, galvanized roof and the manufacture of brass. It is also used for fruit jar cov-

erings. The steel trade uses about sixty per cent of the commercial zinc.

The furnace building is about three hundred feet long, eighty feet wide, two stories high, with two smokestacks about one hundred twenty-five feet high, built of reinforced concrete. The Hegler kiln building does not have a chimney or smokestack, and there are no smokestacks or chimneys in the oxide building, only a ventilator running through the middle of the building across the top. The oxide bag house has no flues or chimneys, and aside from the ventilators in the Hegler kiln and the acid plant, there are no other flues except at the oxide furnace building, which are about thirty-five feet high and two in number. To roast the ore in both the main plant and the oxide, bituminous coal mined in Montgomery

County, Illinois, is used. Spelter, sulphuric acid and zinc oxide are therefore the products of this plant.

There were various pleadings in the cause charging negligence, injuries and averring damages and on the trial of the cause the following stipulation was entered into:

"It is hereby stipulated and agreed by and between the attorneys for the respective parties to this lawsuit that this cause shall be tried by both parties on the theory that the plant of the defendant is operated as a permanent one, and that the damages recoverable are such as are known to the law as permanent damages and the question of the statute of limitations is not to be raised in said cause."

Appellant's smelter plant had been in operation since 1911 or 1912. Appellee was a coal miner, living in Taylor Springs, a village of about fifteen hundred population and owning an acre of land upon which he had constructed a dwelling house at a cost of $840.00 and an addition thereto at a cost of $350 and had made various improvements to said property, such as putting eave spouts upon the house, a porch, fences, and had set out fruit trees and vines of various kinds and the acre of land had originally cost appellee $350. The premises of appellee were situated five-eighths of a mile north of the north gate of the smelter of appellant. There were three dwelling houses between the smelter plant and appellee's premises. Appellee acquired the premises in question and improved them prior to the construction of the smelter plant.

On the trial of the cause appellee was permitted to testify to the cost of the land, the buildings, and all of the various

improvements that had been placed upon the premises to make them suitable for a home, and appellee and other witnesses, over the objections of appellant, were permitted to testify that in 1916 the value of appellee's premises, for use as a home for the purpose that appellee used them, was from three thousand to thirty-two hundred dollars, and that said premises, at the time of this suit, had no value for use as a home. Five witnesses, including Amos Schaffer, had so testified in behalf of appellee, over the objections of appellant, at the close of the testimony. The Court of its own motion struck out all of the testimony of the four witnesses, not including Schaffer, as to the value of this property, and refused to strike out all of such testimony upon appellant's motion and the testimony of Amos Schaffer, as set out, was not stricken out. The witnesses, except Schaffer, upon leave given by the Court, were recalled by appellee and testified to the market value of the property in 1916 and at the time of bringing suit, in substantially the same figures. Appellee, over the objections of appellant, was permitted to go into the minutest detail as to the cost and expenses of purchasing, improving and constructing said property and to produce checks covering all such expenditures and to testify to the value of fruit and ornamental trees upon said premises. This was error. The fruit and ornamental trees upon said premises, as between the owner and **tort feasor** constituted a part of the real estate. **L. C. & St. L. Con. R. R. Co. v. Spencer,** 149 Ill. 97.

The rule is, where damages are sought, growing out of injuries from a construction of a permanent character or one treated as such, the measure of damages is the difference between the market

value of the property immediately before the alleged injury and immediately after, for any use to which it might be appropriated, not merely for use as a home. 8 R. C. L. 481; **C. & E. I. R. R. Co. v. Loeb,** 118 Ill. 203; **North Shore Street Ry Co. v. Payne,** 192 Ill. 239; **Joseph Schlitz Brewing Co. v. Compton,** 142 Ill. 511; **C. & E. I. R. R. Co. v. McAuley,** 121 Ill. 160; **Penn. Mutual Life Ins. Co. v. Heiss,** 141 Ill. 35; **Van Pelt v. City of Davenport** 42 Ia. 308, 20 Am. Rep. 622; **McGuire v. Brant,** 25 N. J. L., 67 Am. Dec. 49; **Rabe v. Shoenberger Coal Co.** 213 Pa. State, 252, 5 Ann. Cases 216; **Kossler v. Pittsburg etc. R. R. Co.** 208 Pa. St. 50, 57 Atl. Rep. 66; **C. & A. R. R. Co. v. Davis,** 74 Ill. App. 595;

Schrigley v. C. & E. I. Ry. Co. 158 Ill. App. 473; **I. C. R. R. Co. v. Almon,** 100 Ill. App. 530; **Champlin v. B. & O. S. W. R. R. Co.** 140 Ill. App. 94; **Childs v. Alton, Granite & St. L. Trac. Co.** 158 Ill. App. 508.

It is conceded by appellee that the measure of damages in this case is the depreciation in the market value of the property occasioned by the operation of the plant of appellant. **Jones v. Sanitary District of Chicago,** 252 Ill. 591.

At the close of appellant's (defendant) case, appellee and the witnesses Crawford and Schaffer were permitted to testify, in behalf of appellee, that the fair cash market value of the premises in 1916 was three thousand dollars, and that at the time of the trial said premises had no market value for any purpose, the witness Schaffer placing a present value thereon of two hundred dollars. None of these witnesses testified to any knowledge of the market values of real estate in this vicinity or of this land. It was shown that the premises are now occupied by a tenant, who is paying five dollars per month rental. Appellee produced a witness, Butler, a real estate dealer, who testified that the property when first

purchased and improved and when the buildings were new, had a market value of three thousand dollars; that there had been a great demand for places of this kind, but the witness testified that the present market value of this property was eight hundred dollars. This witness accounted for twenty-five to fifty per cent of this depreciation to the lack of money and financial conditions, and to general market conditions, outside of any special reasons, and the witness further testified that the market value of this property had very much depreciated in the two months preceding the trial on account of a strike at the coal mines at Taylor Springs, and among other things the witness testified that the location of this property was "out of the way and not good;" that "there were no sidewalks and it was off from the main road." The witness Butler further tesified that he accounted for a portion of the depreciation in the "wear and tear" of the buildings during the period they had been built, and the testimony of this witness, the only qualified witness produced by appellee, as to values, being in direct conflict with the testimony of the other witnesses, submitted by appellee, and contradicting the verdict, we are of the opinion that the testimony of appellee and his other witnesses as to value, and the error in admitting in detail the cost and expense of purchasing and improving the

property, although a portion of the incompetent testimony was striken out, influenced and prejudiced the jury to find a verdict that is not warranted, even by appellee's proofs in this case. We are further confirmed in this view by some of the other testimony in the case.

Appellee offered testimony tending to show that the trees on

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his premises commenced to die in about 1917 and the wire fence gave way; that the trees would form a white spot on the south side of them and it would go around and kill the tree; that the fence first gave way on the south line; that the wire fence north of the hog house was good on the north side, but was gone on the east side; that appellee noticed gas or fumes at the place when the wind was in the south and sometimes it was impossible to stay in the front part of the house and leave the windows up in the summer time; that the gas and fumes caused a burning sensation in appellee's eyes, throat and made him cough. Appellee testified that the gas and fumes came from the smelter of appellant, and that his ground of such knowledge was that he could see where the smoke came from and "knew that it never bothered him before the smelter came."

Appellee testified that the gas and fumes killed all the grass and was killing his trees; that some things in the garden would come up and grow for a while, turn yellow and die, except where it was protected and that potatoes would not grow except on the north side where they were shaded.

On the other hand, appellant offered expert testimony, which was not contradicted, tending to show that appellee's fruit trees were affected by the San Jose scale, which had killed some of the trees and had injured others; that if there was any gas in the air, that is destructive or injurious to plant life, it will manifest itself first in the leaves of the plant.

Edwin R. Spencer, a professor of biology in the State Teachers College of Missouri, had made investigations upon these premises, and the trees and plant life upon the same, and the witness went fully

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into the scientific and biological condition of the tree and plant life upon appellee's premises and stated facts from which the conclusion could be drawn that the tree and plant life upon these lands had been in no manner injured by any gases or

fumes from any source. In addition to this, there are in evidence photographs and views taken of appellee's premises from all directions and at all seasons, during the later years, and especially during the growing seasons of 1922 and 1923, which in the picture show a wealth of luxuriance and a profusion of leaf, flower and plant, in which the most fastidious of "Land Agents" would revel, and to which the wisest of "land seekers" would be importuned. Men are shown sitting upon and leaning against the fences that had been destroyed as appellee's witnesses testified. Beautiful hydrangeas, weighted and bending over with the full crowned flowers, are shown in the yard in August, 1923, and the fruit trees and bushes, full leaved and bearing fruit, are shown growing in the summer and fall of 1922 and 1923, and vegetables growing in abundance.

We do not give full credence to all that these works of art pretend to portray. Photographs, in some respects, may be misleading, but there are sufficient controverted and uncontroverted facts in the record to satisfy this Court that the testimony of appellee, in detailing the full and complete expenses and cost of this land and all of the improvements placed thereon, and the further testimony of the witnesses that the premises had no value as a home, although later stricken out, was very prejudicial to appellant on the trial of this case, and the testimony before the jury did not warrant a verdict in the sum of two thousand dollars against appellant.

In this case it was vigorously denied that any damage had accrued to the appellee's property from the gas and fumes from appellant's plant, or that any gases and fumes emanated from said plant; nevertheless, eleven witness were permitted to testify, in behalf of appellee, over the objection of appellant, that there were gases and fumes from appellant's plant that spread over appellee's property, although they could not see them, and a part only of the witnesses testified that they could smell them.

Part of the same witnesses, having no expert knowledge on the subject, were permitted to testify, over the objection of appellant, to the effect of such gases and fumes on the vegetation upon said lands, and others were permitted to testify that the depreciation in the value of said lands was caused by the gases and fumes that came from appellant's plant. These witnesses had no greater knowledge upon the subjects testified to than the jury had, and the testimony given invaded the province of the jury and was a mere conclusion. 11 Ruling

Case Law, 546; **Keefe v. Armour & Company,** 258 Ill. 28; **Illinois Central Railroad Co. V. Smith,** 208 Ill. 608.

The cases cited by appellee, upon this assignment of error, are cases involving the injury and damage to lands by embankments, water courses and other physical impediments, which all men can see and about which all men have a general, common knowledge and are not in point.

Appellee, as to this assignment, also cites **Wenona Zinc Co. v. Dunham,** 56 Ill. App. 355, in which it is held:

"The witness had given an opinion as to the value of the premises before the location of the works and at the commencement

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of the suit, showing great depreciation, and was then asked what caused the depreciation. It was manifestly necessary and proper to connect the depreciation with the location and operation of the zinc works and the poisonous gases as the cause, and the method adopted was proper, and was approved in K. & S. R. R. Co. vs Horan, 131 Ill. 288."

The authority cited, K. & S. R. R. Co. vs Horan, supra involved facts, about which all men, with ordinary intelligence, would have a common general knowledge, and in Wenona Zinc Co. v. Dunham, supra, it does not seem to be controverted but that gases emanated from the plant of the Wenona Zinc Company and that such gases were poisonous and caused injury and is not applicable in this case. In this case, the testimony of the witnesses who could neither see nor smell the gases or fumes, was a mere guess and incompetent and the fact that some of the witnesses could smell the gas fumes did not render the witnesses competent, in view of all the other testimony in this case, to testify that such gases and fumes were the cause of the depreciation in the value of said property.

In many of the questions asked and answers given, the testimony given invaded the province of the jury.

In **Keefe V. Armour Co., supra,** it was held:

"Any one of the jury was as well qualified as he to determine whether the explosion was a gas explosion or not. The question whether the method employed was reasonably safe was an ultimate fact in the case, to be determined by the jury as a conclusion from evidentiary facts. To permit the witness to give his opinion on the ultimate fact was to supplant the jury by a witness and

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practically take from the defendant the right to a judgment of the jury as to the proper inference to be drawn

from the facts. Of course, the jury was entitled to the aid of experts in determining the existence or nonexistence of facts not within the common knowledge from which a conclusion would arise whether the method was reasonably safe."

Appellant assigns error in that the Court permitted the witnesses to testify with reference to the smoke, fumes and gases being carried from appellant's plant to property other than appellee's, and also to show the condition of other property at the time and since appellant's plant commenced to operate. In a proper case, where the testimony of competent witnesses tends to show the emanation and deleterious effect of gases, fumes, dust and similar substances upon the soil, shrubbery, trees, vegetation, buildings or fences, under the authority laid down in **Cooper v. Randall,** 59 Ill. 317, **Wylie v. Elwood,** 134 Ill. 281, and kindred cases, we are not prepared to hold that such testimony is incompetent and whether it was incompetent in the case at bar, in view of all the testimony in the case, in the view we have arrived at, it becomes unnecessary to determine. In any event, upon another trial of the cause, the injury resulting from the effect of gases and fumes from appellant's plant, if any, and the injuries resulting to the surrounding lands from other causes, if any, should be carefully distinguished and the latter eliminated.

Appellant assigns error upon the giving of appellee's fourth and fifth instructions. The fourth instruction, given for appellee,

informed the jury that it was not necessary that any witness should have expressed an opinion as to the amount of the damages, but that the jury themselves might make such estimate from the facts and circumstances in proof and by considering them in connection with their own knowledge, observation and experience in the business affairs of life. The giving of this instruction was error. It left the jury to fix the amount of damages, not guided by any rule as to the measure of damages, and not guided by the testimony of any of the witnesses as to the amount of depreciation in the value of said property. It is argued by appellee that in other instructions the true measure of damages was correctly stated to the jury and that the amount of the damages fixed by the verdict, being less than the amount testified to by some of the witnesses, indicates clearly that the jury followed the instruction as to the correct measure of damages. It is impossible for this Court to follow that suggestion or to determine, from all the tes-

timony, what rule or measure of damages the jury accepted. We are inclined to the opinion, in view of the instruction and the testimony, that the jury disregarded all rules as to the measure of damages and all opinions as to the amount of damages stated by any witness, and invaded the field of their own business experience and knowledge, and found a verdict based partially, at least, upon incompetent testimony that had been stricken out. This instruction given to the jury was prejudicial and erroneous.

The fifth instruction, informing the jury that they would have a right to take into consideration all damages appellee may have sustained, in so far as the same has been alleged and proven by a preponderance of the evidence, if any, taken in connection

with the fourth instruction, was also error in this case.

Appellant has also assigned error upon statements made by appellee's counsel in arguing the case to the jury, and specific statements, charged to be inflammatory and prejudicial, were objected to and are set out in the bill of exceptions. Some of these statements are subject to criticism and were not within the line of proper argument, but as the verdict and judgment are to be reversed on other grounds, further comment is unneccessary.

In this case appellant has submitted testimony of a highly scientific nature, tending to show that the trees, shrubbery and vegetation upon appellee's premises, not showing any injury or defect in the leaves, could not have been injured in any manner by the gases and fumes, if there were such, emanating or escaping from appellant's plant. This testimony tends to show that the plant feeds and is nourished through its leaves, and that any poisonous or deleterious gases or fumes in the air, injuring or affecting the plant in any manner, are first manifested by their effects upon the leaves. This testimony is not contradicted and its presence in the record in this case necessitates a more careful scrutiny of the testimony of appellee's witnesses, who did not have and who did not claim to have any special skill or knowledge as to the effect of gases of any kind upon plant life. This testimony, together with the testimony of the expert witnesses, tending to show that appellee's trees and shrubbery have been and were, at the time of bringing the suit, affected and injured by the San Jose scale, which is uncontroverted by any of the testimony in the case, together with the errors pointed out

in the record, require reversal of the judgment and verdict in this cause.

The judgment of the lower court is, therefore, reversed, and the cause is remanded to the Circuit Court of Montgomery County for another trial.

Reversed and Remanded.

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235 I.A. 636

General No. 7702. Agenda No. 7

April Term A. D. 1924

People of the State of Illinois, Defendants in Error.

vs.

Henry Lifer, Plaintiff in Error.

Error to County Court of Hancock County.

NIEHAUS, J.

The plaintiff in error, Henry Lifer, was indicted in Hancock county for manufacturing, unlawfully selling, and transporting, and having in his possession intoxicating liquor. There are seven counts in the indictment, in which the various offenses are alleged. The indictment was certified by the circuit court to the county court, where a trial resulted in a verdict of guilty. He was thereupon sentenced to serve a term of six months in the county jail, and to pay a fine of $500.00, and costs; this writ of error is prosecuted from the judgment of conviction.

It appears from the record, that during the trial, John Shea was called and sworn as a witness by the state's attorney, who made the following statement to the court conceruing the witness: "I put him on the witness stand as a hostile witness, he wont talk to me, and I put him on to have an opportunity of cross examination. I would like to have him examined in chief by the court, so that I may have the opportunity of cross examination." Plaintiff in error by his counsel objected to the court calling and examining the witness, but the objection was overruled, and the court proceeded, not only to examine the witness, but also, after the cross examination of the witness by plaintiff in error's counsel, proceeded to re-examine the witness; and the re-examination was in effect an additional cross examination, concerning the testimony previously elicited by the court in the examination in chief. This re-examination was as follows:

By The Court:

Q. Didnt you tell me Mr. Phillips was part of the time and Lifer part of the time was taking care of it?

By Mr. Hartzell: I want to object to the line of question—by the Court. This witness was asked to be put on the

witness stand by the prosecutor, as a hostile witness. He asked the Court for that privilege and for the Court to examine him in order that he might have the privilege to cross-examine him. Now, the Court

examined the witness and he showed no hostility. Now I dont believe it is right for the Court to try to make a witness out as being mistaken in regard to it, and I object to it.

By The Court: I object to your remarks as to the witness showing no hostility. He showed hostility to the Court. His manner was hostile. He has contradicted himself. He told me on direct examination, and the record will show it, that both Mr. Lifer and Mr. Philips were present. I simply asked him to straighten that out.

By Mr. Hartzell: With all due respect, I want to an exception to the remarks of the Court as made in the presence and hearing of the jury.

The incident complained of comes clearly within the criticism made by the Supreme Court concerning the examination of witnesses by the court in criminal cases: "Such a practice is not to be commended, and can only be permitted when it is shown that otherwise there may be a miscarriage of justice. We are convinced, that in the examination of the witnesses by the trial judge, doubtless unconsciously on his part, he made statements and asked questions in such a form as would almost certainly lead the jury to conclude that he thought the plaintiff in error was guilty. We are impressed from a reading of the record that the questions of the judge would appear to the jury to be in the interest of the prosecution. Expressions of opinion by the judge are liable to have great weight with the jury, and therefore especial care should be observed that nothing is said by him to prejudice either party." People v. Bernstein 250 Ill. 63.

Complaint is also made of the giving of the fourth instruction for the People, which is as follows:

The Court instructs you that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe and do believe, from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proved in the case.

This instruction has been repeatedly condemned, and is erroneous for the reasons stated in Kellar v. Hansen 14 Ill. App. 640 and Johnson v. Farrell 215 Ill. 542. For the errors indicated, judgment is reversed and the cause remanded.

235 I.A. 637

General No. 7712 Agenda No. 11.

April Term A. D. 1924

Susan H. Dickinson, Appellee.

vs.

J. Weir Elliott, as Executor of the Last Will and Testament of Job Coates, Deceased, Appellant.

Appeal from Morgan.

NIEHAUS, J.

Susan H. Dickinson, the appellee, filed a claim in the county court of Morgan county, against the estate of Job Coates, deceased, claiming the sum of $15682.50 to be due her from the estate, for services rendered to the deceased in his life time, as housekeeper, as nurse; and for services in looking after the administration and management of the business affairs of the deceased, during the last years of his life. A jury trial was had on this claim in the county court; and the jury found in favor of the appellee, and awarded her the sum of $12,000.00. The county court rendered judgment on the verdict; and an appeal was thereupon prosecuted to the circuit court, where another trial resulted in a verdict by the jury, allowing her the sum of $11,000.00; the verdict was set aside, and a new trial was ordered by the court; and thereafter another jury trial was had, which resulted in another verdict in favor of the appellee, allowing her the sum of $12,100.00. A motion was made to set aside the latter verdict, and for a new trial; but at the instance of the court, the claimant entered a remittitur to reduce the amount found by the verdict, to $5,000.00, whereupon the motion for new trial was overruled, and judgment was rendered in favor of the appellee, for that sum. This appeal is prosecuted from the judgment.

The evidence tends to show, that the appellee entered into the services of the deceased about December 1, 1917, as a housekeeper, at a fixed compensation of $5.00 per week. The deceased was a wealthy farmer, owning several farms in the vicinity of Orleans in Morgan county; and at the time of the appellee's

employment, was living on the home farm near Orleans. He was a bachelor, and had been living by himself; and was advanced in years. The appellee performed all the duties incident to her employment, as a house keeper of the deceased, including not only looking after the house, and the work and affairs of the farm for the deceased, but also assist-

ed him in carrying into effect his business arrangements concerning other farms, and with the tenants, who occupied them. After the appellee had been in the employ of the deceased for about a year, the deceased had a stroke of apoplexy; and from that time on, his general health became impaired, to such an extent as to require the continued attention of a physician, and constant care and nursing; and he became unable to look after his physical wants; and finally also, he became incapaciated to attend to his business affairs. It clearly appears from the evidence, that after the first stroke of apoplexy suffered by the deceased, which was in December 1918 until the time of his death about the middle of July 1920, the appellee acted in the capacity of nurse, performing all the services of a practical nurse, day and night, such as giving him medicine, bathing him, dressing, and undressing him assisting him to and from his bed in attending to the calls of nature; and giving him all the care and attention required of a regular nurse, until his death. The main contention of the appellant is, that the appellee is not entitled to recover for the extra services rendered by the appellee as nurse, and for attending to the business matters of the deceased. The services which the appellee performed as a nurse, during the period from December 13, 1918, to July 17, 1920, were outside of the scope of her original employment; and were not thought of, nor contemplated in the arrangement for her employment as housekeeper, and when the compensation of $5.00 per week was fixed; and these services may be justly and fairly regarded therefore as extra services, which were rendered in addition to her regular employment, and for which she would be entitled to additional compensation. Dull v. Bramhall 49 Ill. 364; 26 Cyc. 1037.

It is contended by the appellee, that under the rule held

in the case cited, she would also be entitled to additional compensation for assisting the deceased in matters of business and the conduct of the affairs of the home farm, and other farms of the deceased, and finally for looking after practically all of his business matters after the deceased had become almost entirely incapacitated. Some of the services rendered in that regard might properly be regarded as extra services, for which additional compensation should be awarded; while on the other hand many of the things, which the appellee did on the home farm, were so closely connected with the duties of a farm housekeeper that they should justly be regarded as an incident thereto; but it is sufficient to say concern-

ing this feature of the case, that there is no evidence in the record which shows the value of such alleged extra services; and for that reason alone, a recovery for such services cannot be sustained. And in this state of the record, the appellee's right of recovery, was limited to any balance remaining due under her original contract of employment; and the value of the extra services performed for the deceased as a practical nurse, from December 13, 1918 to July 17, 1920; a period of eighty-three weeks. Assuming that appellee was entitled to the largest amount which the testimony shows, to be usually and customarily paid for such services at the place where they were rendered, she would be entitled to recover on that account $35.00 per week for the eighty-three weeks, or $2905.00. Apparently there was also a balance due her for wages as housekeeper; the appellant testified, that he had a conversation with the appellee after the death of Coates, concerning her claim; and that the appellee in that connection made the following statement: "She said Mr. Coates had paid her at the rate of $5.00 per week up to early that year. I should say the first part of February. That was for her regular wages." There was no contradiction of this testimony; and this appears to be the only evidence which shows, the state of the account between the appellee, and the deceased concerning her wages as housekeeper; and it indicates that there was due to her, a balance on account of her regular wages, from February 1920 to the date of Coates death,

or for twenty-four weeks; and which would amount to the sum of $120.00. This sum added to the amount due her as nurse, would make a total of $3025.00. The judgment for $5,000.00 is therefore in excess of the amount due her as shown by the evidence; and the judgment must therefore be reversed, unless the appellee will remit the amount necessary to reduce the judgment to the sum stated. If such remittitur is made within ten days, it is ordered that the judgment be reduced to, and affirmed for $3025.00. If the remittitur is not made, the judgment will stand as reversed, and the cause, as remanded.

General No. 7715. Agenda No. 13.

April Term, A. D. 1924

Calvin McCarl, Appellee.

vs.

City of Quincy, a Municipal Corporation, Appellant.

Appeal from Adams.

NIEHAUS, J.

This is an appeal from a judgment rendered in the circuit court of Adams county for the sum of $2,000.00 in favor of Calvin McCarl the appellee, and against the appellant, City of Quincy. The suit was brought by the appellee against the City of Quincy to recover damages for injuries resulting from a fall on an alleged defective stone step, which was a part of the sidewalk at the southeast corner of Sixth and Hampshire streets in that city.

It is charged in the declaration, that the stone step had a slanting smooth and slippery surface, and was therefore unsafe and dangerous to pedestrains who used the same in the exercise of due care, and that the city was negligent in maintaining it in the defective condition referred to. The appellee testified, that about six forty-five o'clock in the evening of the 22nd day of February 1923, while he was walking up Sixth street along the sidewalk at the southeast corner of Sixth and Hampshire streets, he stepped down on the stone step in question, and slipped and fell, and suffered a fracture of his leg, which was broken in two places. He testifies concerning the situation and the condition of the stone step in question as follows: "The surface of the sidewalk proper at the corner of Sixth and Hampshire streets was above the paved street a foot probably; I would say, it was twelve inches. Up against the curve of this sidewalk there was a stone step. I would judge it was from nine inches to a foot wide, and something like thirty inches, or maybe four feet long; something like that, and it was worn off. It was six or eight inches high. It stood up against the curve proper. There was a step going up and down from the main side walk to the paved street. It was worn off

perfectly smooth and slick on the top of it, caused by the use and wear. It slanted toward the west. That would be out from the sidewalk. A slant at the outer edge of that stepping stone, I would judge was in the neighborhood of three inches; probably

not so much, but it was a good deal. It was worn off pretty bad. I was coming north, then I was going west to the barber shop. I just walked up there to the corner and went to go across the same as I would any place else, and my foot slipped on that stone, and it threw me on to the street paving. *** I had seen that stone before. I never paid very much attention to it. *** There was no snow or ice on that stone that day, it was perfectly dry. *** My foot slipped off the step; when I stepped down on to the step my foot slipped off west. It slipped off the rock."

It is contended by the appellant that the wear on this stone, and the condition it was in with reference to being worn smooth slippery and slanting, did not constitute a defect dangerous to pedestrains in the exercise for their own safety. Whether the condition of the stone step was a dangerous one to pedestrains in the exercise of due care for their own safety, was a question of fact for the jury to determine from the evidence. Brennon v. City of Streator 256 Ill. 468. Whether the appellee was in the exercise of due care, and not guilty of contributory negligence, was also a question of fact for the jury to pass upon. Shearer v. Aurora, E & C. R. Co. 200 Ill. App. 225; Douglas v. Wabash Ry Co. 149 Ill. App. 612. We cannot justly say, that the jury were not warranted from the evidence, in determining these questions of fact in favor of the appellee.

It is also contended, that the City had no notice either actual or constructive, that the step in question was in a defective condition. The proof shows, that the step was in the slanting, smooth and slippery condition for a number of years; and was situated in a busy part of the city. Under these circumstances, the city was chargeable with notice and was presumed to have had knowledge of the condition of the step. Graham v. Rockford 238 Ill. 217.

Complaint is also made, because the court refused to give the following instruction for the appellant: "The court instructs the jury as a matter of law, that no action is maintainable for a

personal injury which is the result of a pure and unavoidable accident; and in this case, if the jury believe from a preponderance of the evidence, that the injury which the plaintiff in this case complains of, and for which he has brought suit, is the result of a

pure accident, then the jury should find the defendant not guilty." The refusal to give this instruction was not error. It left to the jury the question of what was pure accident, to speculate upon and determine; and was therefore properly refused.

The record does not disclose any reversible error, and the judgment is affirmed.

Judgment affirmed.

235 I.A. 637

General No. 7746 Agenda No. 42

April Term, A. D. 1924

Jake Zimmerman, Appellant.

vs.

J. A. McCreery, H. A. McCreery and J. R. McCreery, doing business under the name of J. A. McCreery & Sons, Appellees.

Appeal from Mason.

NIEHAUS, J.

This suit was brought under Section 132 of the Criminal Code by the appellant Jake Zimmerman, in the circuit court of Mason county, against the appellees, J. A. McCreery, H. A. McCreery and J. R. McCreery, doing business as McCreery & Sons. The object of the suit is to recover treble the amount of money, which is alleged to have been lost in gambling in grain futures in violation of Section 130 of the Criminal Code, by George Zimmerman, the son of the appellant. The Section referred to provides: "That whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, **** where it is at the time of making said contract, intended by both parties thereto, that the option whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt of delivery of such property, but by the payment only of differences in the prices thereof *** shall be fined ***; and all contracts made in violation of this section, shall be considering gambling contracts, and shall be void." A trial by jury resulted in finding the appellees not guilty; a motion for a new trial was denied by the court; and a judgment was rendered on the verdict of the jury, and against the appellant for costs. This appeal is prosecuted from the judgment.

The transactions from which this controversy has

arisen, relates to grain deals, and trades between George Zimmerman, and the appellees. The appellees are engaged in the grain business in Mason City, and maintain a business office at that place. The vital question which was involved in the trial, was, whether the transactions between George Zimmerman and the appellees, violated Section 130 of the Criminal Code; whether the contracts between the parties were gambling contracts; and the determination of this question involved a finding upon the fact, whether or not the grain deals and trades made by George Zimmerman with the appellees, which were options to sell or buy at a future time, were made with

reference to an intention by both parties thereto, that they should be settled by the receipt or delivery of grain, or by the payment of the differences in the market prices of the grain.

Two questions are presented by the appellant for consideration on this appeal, namely, that the court erred in its refusal to direct a verdict for the appellant; and that the verdict of the jury is contrary to the manifest weight of the evidence.

The evidence in the record discloses, that at different times during the months of April and May, 1920, George Zimmerman, by arrangement with the appellees, entered into about thirty different deals or trades for the purchase and sale of corn, which resulted in either profits or losses; but principally in losses; and the profits and losses were adjusted by the appellees with Zimmerman according to the differences between the market prices of the corn when purchased, and when sold. The appellees kept a record of the deals and trades which Zimmerman made with them; and the record shows in detail, each of the trades; and the amounts gained or lost on the corn thereby purchased and sold; and it shows also, that the final net total loss incurred by Zimmerman was $5050.00. Zimmerman testified, that it was understood between him and the appellees, that the deals or trades contracted for, were to be settled by the differences

in the market prices of the corn purchased and sold; while the appellees in their testimony concerning the same transactions, state that it was their understanding and intention, that there should be an eventual acceptance or delivery by Zimmerman of the corn involved in the deals or trades. In the record of these trades and deals kept by the appellees, not a single instance appears however, where Zimmerman received any corn purchased, or delivered any that he sold; but it does clearly appear that in all instances, the deals were settled for, by the differences between market prices; indeed it is apparent from the situation of the parties, and from the financial conditions, and the business facilities of the parties, that an acceptance by Zimmerman or delivery by him of the corn involved in the deals would have been so impracticable that it could hardly have been thought of. Moreover, it is a just and reasonable inference, taking into account, the nature and character of the deals, and the manner in which they were carried out, as shown by the appellees' own records, that they were carried out as the parties intended they should be car-

ried out. In this view of the matter, it is manifest, that the verdict of the jury is against the weight of the evidence. The court did not err, however, in refusing to direct a verdict; inasmuch as there was some evidence introduced, which tended to prove, that an acceptance and delivery of the grain was intended. The court could not in directing a verdict, pass on the weight or sufficiency of such evidence; this was a question for the jury.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

These were omitted from my copy of today's opinion. C.A. Smith.

STATE OF ILLINOIS

APPELLATE COURT------THIRD DISTRICT

235 I.A. 637

AT AN APPELLATE COURT, begun and held for the Third District of the State of Illinois, at Springfield, On the FIRST TUESDAY in April, A. D. 1934.

PRESENT

Hon. Edward D. Shurtleff, Presiding Justice.

Hon. John M. Michaus, Justice.

Hon. Oscar E. Heard, Justice.

Attest: LAURA B. WALMSLEY, Clerk.

BE IT REMEMBERED, that afterward To-wit: On the seventeenth day of June, A. D. 1934, there was filed in the office of the said Clerk of said Court, an opinion of said Court, in words and figures following:

235 I.A. 637

General No. 7746 Agenda No. 42.

April Term, A. D. 1934.

JAKE ZIMMERMAN, appellant.

vs.

J. A. McCREERY, H. A. McCREERY and J. R. McCREERY, doing business under the name of J. A. McCREERY & SONS, Appellees.

Appeal from Mason.

MIKELAUS, J.

This suit was brought under Section 132 of the Criminal Code by the appellant Jake Zimmerman, in the Circuit Court of Mason County, against the appellees, J. A. McCreery, H. A. McCreery and J. R. McCreery, doing business as McCreery & Sons. The object of the suit is to recover treble the amount of money, which is alleged to have been lost in gambling in grain futures in violation of Section 130 of the Criminal Code, by George Zimmerman, the son of the appellant. The section referred to provides: 'that whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity,***where it is at the time of making said contract, intended by both parties thereto, that the option whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt of delivery of such property, but by the payment only of differences in the prices thereof***shall be fined***; and all contracts made in violation of this section, shall be considering gambling contracts, and shall be void.' A trial by jury resulted in finding the appellees not guilty; a motion for a new trial was denied by the court; and a judgment was rendered on the verdict of the jury, and against the appellant for costs. This appeal is prosecuted from the judgment.

The transactions from which this controversy has

Page 1

arisen, relates to grain deals, and trades between George Zimmerman, and the appellees. The appellees are engaged in the grain business in Mason City, and maintain a business office at that place. The vital question which was involved in the trial, was, whether the transactions between George Zimmerman and the appellees, violated Section 130 of the Criminal Code; whether the contracts between the parties were gambling contracts; and the determination of this question involved a finding upon the fact, whether or not the grain deals and trades made by George Zimmerman with the appellees, which were options to sell or buy at a future time, were made with reference to an intention by both parties thereto, that they should be settled by the receipt or delivery of grain, or by the payment of the differences in the market prices of the grain.

Two questions are presented by the appellant for consideration on this appeal, namely, that the court erred in its refusal to direct a verdict for the appellant; and that the verdict of the jury is contrary to the manifest weight of the evidence.

The evidence in the record discloses, that at different times during the months of April and May, 1920, George Zimmerman, by arrangement with the appellees, entered into about thirty different deals or trades for the purchase and sale of corn, which resulted in either profits or losses; but principally in losses; and the profits and losses were adjusted by the appellees with Zimmerman according to the differences between the market prices of the corn when purchased, and when sold. The appellees kept a record of the deals and trades which Zimmerman made with them; and the record shows in detail, each of the trades; and the amounts gained or lost on the corn thereby purchased and sold; and it shows also, that the final net total loss incurred by Zimmerman was $5050.00. Zimmerman testified, that it was understood between him and the appellees, that the deals or trades contracted for, were to be settled by the differences

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in the market prices of the corn purchased and sold; while the appellees in their testimony concerning the same transactions, state that it was their understanding and intention, that there should be an eventual acceptance or delivery by Zimmerman of the corn involved in the deals or trades. In the record of these trades and deals kept by the appellees, not a single instance appears however, where Zimmerman received any corn purchased or delivered any that he sold; but it does clearly appear that in all instances, the deals were settled for, by the differences between market prices; indeed it is apparent from the situation of the parties, and from the financial conditions, and the business facilities of the parties, that an acceptance by Zimmerman or delivery by him of the corn involved in the deals would have been so impracticable that it could hardly have been thought of. Moreover, it is a just and reasonable inference, taking into account, the nature and character of the deals, and the manner in which they were carried out, as shown by the appellees' own records, that they were carried out as the parties intended they should be carried out. In this view of the matter, it is manifest, that the verdict of the jury is against the weight of the evidence. The court did not err, however, in refusing to direct a verdict; inasmuch as there was some evidence introduced, which tended to prove that an acceptance and delivery of the grain was intended. The court could not in directing a verdict, pass on the weight or sufficiency of such evidence; this was a question for the jury.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

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230 ILL. APP. 673.
REHEARING DENIED
JAN. 26, 1923.

THE OPINION.

General No. 7537. Agenda No. 61.

October Term A. D.1922.

Jake Zimmerman, Appellant.

vs.

J. A. McCreery, H. A. McCreery and
J. R. McCreery, doing business under
the name of J. A. McCreery & Sons,
Appellees.

Appeal from Mason.

NIEHAUS, P. J.

Jake Zimmerman, the appellant, commenced this suit under Section 132 of the Criminal Code, in the circuit court of Mason County against the appellees, J. A. McCreery, H. A. McCreery, and J. R. McCreery, doing business as McCreery & Sons, to recover treble the amount of money alleged to have been lost by his son George Zimmerman, in gambling in grain futures, in violation of Section 130 of the Criminal Code, which provides, "that whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock etc., * * * where it is at the time of making said contract intended by both parties thereto that the option whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in the prices thereof * * * shall be fined * * *; and all contracts made in violation of this section shall be considered gambling contracts and shall be void." There was a trial by jury, which resulted in a

verdict of not guilty. The appellant made a motion for a new trial, which was denied by the court; and judgment thereupon rendered on the verdict in favor of the appellee. This appeal is prosecuted from the judgment.

The record discloses, that the grain deals or trades involved in the transaction between the parties took place in Mason City, where the appellees maintained a business office; the deals and trades related to the purchase and sale of corn for future delivery, and were carried into effect by the appellees in connection with certain brokers in Chicago who were members of the Board of Trade. The main error assigned, relates to the testimony of witnesses given on the trial over the objection of the appellant, concerning the manner and form of handling deals and trades involving purchase and sale of grain for future delivery on the Board of Trade in Chicago; witnesses who were connected with broker corporations or firms as employes or in some capacity, were called and allowed to testify. The witnesses testified, over the objection of the appellant, to matters concerning trade and grain deals handled on the Board of Trade in Chicago, and how the trades and deals placed there by the appellees were handled. Also testified, what the intentions of the firms or corporations whom they represented in the transactions were concerning a future delivery of the grain involved in the deals, and the rules and regulations of the Board of Trade in relation thereto; and what these broker firms and corporations would have done in reference to a delivery of grain, involved in the trades or deals handled by them, if the deals or trades had not been closed out, but had been allowed to remain in force until the month fixed for delivery. This evidence was incompetent as well as immaterial under the issues in this case. And the testimony of the witnesses referred to, concerning the intentions

of the broker corporations or firms was after all, only the opinion or conclusion of the several witnesses. Moreover, what the intentions of the several brokers, who handled the deals on the Board of Trade, were, concerning a delivery, as well as the conclusions of the witnesses, as to what these brokers would have done if the grain deals had been allowed to remain in force, related to an event that never happened. The intention of third parties with reference to grain deals or trades, even if shown by competent evidence, would not tend to prove or disprove what the arrangement or understanding was between the parties. As was pointed out in Jamieson v. Wallace, 167 Ill. 388: "The question here in issue is with reference to the dealing and understanding between the appellants and appellee, and not in regard to the knowledge and understanding of parties in New York. If the understanding between appellants and appellee was that the deal as between themselves should be settled upon differences, and that there should be no delivery of the stocks, then the contracts as between them were gambling contracts, and within the statute."

In Partridge v. Cutler, 168 Ill. 504 practically the same question here involved, was considered and decided. The court there said: "The issues between the parties to the suit were few and simple, and neither the Board of Trade as a corporation, nor its other members as individuals were in any manner concerned with them. * * * The only issue on that question was, as to the nature of these transactions as between the plaintiff and the defendant, and all the facts, near or remote, bearing on that question, and all the other issues in the case were in the knowledge of four or five witnesses, yet the issues were so misapprehended, that the Board of Trade and its rules and regulations were made the subject of investigation."***

It is not claimed, that all dealings on the Board of Trade are gambling transactions, while, perhaps, no one will deny, that a part of the business transacted there is of that character. Plaintiff might have made bona fide purchases and sales for actual receipt and delivery in every instance, but the forms adopted could be used with equal facility by counter purchases and sales and settlement of differences, for illegal and illegitimate dealings as between him and the defendant. Although these deals were closed out before maturity, and the transactions ended as between the parties to the suit, the plaintiff was permitted by the court, against objections, to go into long examinations as to what would have been done, if they had not been closed out. * * * This evidence was immaterial. * * * It made no difference what the character of the contract were as between the plaintiff and other members of the Board of Trade with whom they were made, nor what his liability to them would be at the maturity of the contract."

It is clear under the authorities cited, that the admission of the evidence referred to, was error; and that it may have misled the jury into an erroneous conclusion as to the legitimacy of the deals and transactions between the appellant and the appellees. We conclude therefore, that this case should be submitted to another jury; and the judgment is therefore reversed and cause remanded.

Reversed and Remanded.